

**H.R. 1314, H.R. 1927, H.R. 4256,  
H.R. 4284, H.R. 4319, AND  
H.R. 4866**

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**LEGISLATIVE HEARING**

BEFORE THE

**COMMITTEE ON NATURAL RESOURCES  
U.S. HOUSE OF REPRESENTATIVES**

**ONE HUNDRED THIRTEENTH CONGRESS**

**SECOND SESSION**

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Tuesday, September 9, 2014

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## CONTENTS

Hearing held on Tuesday, September 9, 2014 .....	Page 1
Statement of Members:	
Crawford, Hon. Rick, a Representative in Congress from the State of Arkansas, Prepared statement of .....	10
DeFazio, Hon. Peter, a Representative in Congress from the State of Oregon .....	4
Hastings, Hon. Doc, a Representative in Congress from the State of Washington .....	2
Prepared statement of .....	3
Miller, Hon. George, a Representative in Congress from the State of California, Prepared statement of .....	81
Statement of Witnesses:	
Birmingham, Thomas W., General Manager/General Counsel, Westlands Water District, Fresno, California .....	68
Prepared statement of .....	69
Fischman, Robert L., Professor of Law, Indiana University Maurer School of Law, Bloomington, Indiana .....	15
Prepared statement of .....	17
Frazer, Gary, Assistant Director for Ecological Services, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC .....	20
Prepared statement of .....	22
Jennison, Robin, Secretary, Kansas Department of Wildlife Parks and Tourism, Topeka, Kansas .....	53
Prepared statement of .....	55
Li, Ya-Wei, Director, Endangered Species Conservation, Defenders of Wildlife, Washington, DC .....	59
Prepared statement of .....	60
Miller, Dave, Commissioner, Iron County, Utah, Cedar City, Utah .....	51
Prepared statement of .....	52
Ray, Tom, Water Resources Program Manager, Hicks-Ray Associates, Texas Water Conservation Association, and the Western Coalition of Arid States (WESTCAS), Waco, Texas .....	27
Prepared statement of .....	29
Staples, Todd, Commissioner, Texas Department of Agriculture, Austin, Texas .....	6
Prepared statement of .....	8
Veach, Randy, President, Arkansas Farm Bureau, Little Rock, Arkansas ..	12
Prepared statement of .....	14
Wieting, Donna, Director, Office of Protected Resources, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Washington, DC .....	64
Prepared statement of .....	65
Additional Materials Submitted for the Record:	
Barcellos, Tom, Prepared statement with attachment on H.R. 1927 .....	77
City of Dos Palos, Jerry Antonetti, Mayor, August 28, 2014 Letter submitted for the record on H.R. 1927 .....	87
City of Fresno, Georgeanne White, Chief of Staff, et al., July 10, 2014 Letter submitted for the record on H.R. 1927 .....	88
City of Fresno, Ashley Swearengin, Mayor, September 7, 2014 Letter submitted for the record on H.R. 1927 .....	90
Fresno Council of Governments, Amarpreet Dhaliwal, Chair, August 19, 2014 Letter submitted for the record on H.R. 1927 .....	91

# IV

	Page
Additional Materials Submitted for the Record—Continued	
County of Fresno, Board of Supervisors, Henry Perea, Chairman, et al. August 7, 2013 Letter submitted for the record on H.R. 1927 .....	92
Grassland Water District, Ricardo Ortega, General Manager, August 6, 2013 Letter submitted for the record on H.R. 1927 .....	93
Kern County, Board of Supervisors, Leticia Perez, Chairman, July 29, 2014 Letter submitted for the record on H.R. 1927 .....	94
Latin Business Association, Ruben Guerra, Chairman and CEO, August 18, 2014 Letter submitted for the record on H.R. 1927 .....	95
List of documents submitted for the record retained in the Committee's official files .....	98
Nelson, Dan, Executive Director, San Luis & Delta-Mendota Water Authority, Prepared statement on H.R. 1927 .....	87
Paramount Farming Company, William D. Phillimore, Executive Vice President, July 30, 2013 Letter submitted for the record on H.R. 1927 ..	96
Porterville Irrigation District, Tulare County, Mike Ennis, Tulare County Supervisor and Eric Borba, Director, Porterville Irrigation District, September 7, 2014 Letter submitted for the record on H.R. 1927 .....	97

LEGISLATIVE HEARING ON H.R. 1314, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO ESTABLISH A PROCEDURE FOR APPROVAL OF CERTAIN SETTLEMENTS; H.R. 1927, TO PROVIDE CONGRESSIONAL DIRECTION FOR IMPLEMENTATION OF THE ENDANGERED SPECIES ACT AS IT RELATES TO OPERATION OF THE CENTRAL VALLEY PROJECT AND THE CALIFORNIA STATE WATER PROJECT AND FOR WATER RELIEF IN THE STATE OF CALIFORNIA, "MORE WATER AND SECURITY FOR CALIFORNIANS ACT"; H.R. 4256, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO REQUIRE, IN COUNTING THE NUMBER OF A SPECIES IN A STATE FOR PURPOSES OF DETERMINING WHETHER THE SPECIES IS AN ENDANGERED OR THREATENED SPECIES, INCLUSION OF THE NUMBER OF THE SPECIES ON STATE AND PRIVATE LANDS AS DETERMINED BY THE STATE, AND FOR OTHER PURPOSES, "ENDANGERED SPECIES IMPROVEMENT ACT OF 2014"; H.R. 4284, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO ENCOURAGE GREATER STATE INPUT AND AUTHORITY OVER SPECIES AND HABITAT MANAGEMENT BY ALLOWING STATES TO PROPOSE AND IMPLEMENT STATE PROTECTIVE ACTION BEFORE SPECIES ARE LISTED UNDER THAT ACT, AND FOR OTHER PURPOSES, "ESA IMPROVEMENT ACT OF 2014"; H.R. 4319, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO REQUIRE THE SECRETARY OF THE INTERIOR TO PUBLISH AND MAKE AVAILABLE FOR PUBLIC COMMENT A DRAFT ECONOMIC ANALYSIS AT THE TIME A PROPOSED RULE TO DESIGNATE CRITICAL HABITAT IS PUBLISHED, "COMMON SENSE IN SPECIES PROTECTION ACT OF 2014"; AND H.R. 4866, TO REVERSE THE DEPARTMENT OF THE INTERIOR'S LISTING OF THE LESSER PRAIRIE CHICKEN AS A THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT OF 1973, TO PREVENT FURTHER CONSIDERATION OF LISTING OF SUCH SPECIES AS A THREATENED SPECIES OR ENDANGERED SPECIES UNDER THAT ACT PENDING IMPLEMENTATION OF THE WESTERN ASSOCIATION OF FISH AND WILDLIFE AGENCIES' LESSER PRAIRIE-CHICKEN RANGE-WIDE CONSERVATION PLAN AND OTHER CONSERVATION MEASURES, AND FOR OTHER PURPOSES, "LESSER PRAIRIE CHICKEN VOLUNTARY RECOVERY ACT OF 2014"

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**Tuesday, September 9, 2014**  
**U.S. House of Representatives**  
**Committee on Natural Resources**  
**Washington, DC**

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The committee met, pursuant to notice, at 10:05 a.m., in room 1324, Longworth House Office Building, Hon. Doc Hastings [Chairman of the Committee] presiding.

Present: Representatives Hastings, Lamborn, McClintock, Lummis, Benishek, Duncan, Flores, Mullin, LaMalfa; DeFazio,

Grijalva, Costa, Sablan, Cárdenas, Huffman, Lowenthal, and Garcia.

The CHAIRMAN. The Committee on Natural Resources will come to order, and the Chair notes the presence of a quorum, and we have way exceeded that. I appreciate that.

The Committee on Natural Resources meets today to hear testimony on the following bills: H.R. 1314, a bill by our committee colleague, Mr. Flores from Texas, to amend the Endangered Species Act of 1973 to establish a procedure for approval of certain settlements; H.R. 1927, the More Water and Security for Californians Act, introduced, again, by our committee colleague from California, Mr. Costa; H.R. 4256, the Endangered Species Improvement Act of 2014, introduced by our former committee colleague, Mr. Stewart of Utah; H.R. 4284, the ESA Improvement Act of 2014, introduced by another former committee member, Mr. Neugebauer of Texas; H.R. 4319, the Common Sense in Species Protection Act of 2014, introduced by somebody who has not been a member of this committee, Mr. Crawford of Arkansas; and the Lesser Prairie Chicken Voluntary Recovery Act of 2014, introduced by our committee colleague, Mr. Mullin of Oklahoma.

I ask unanimous consent that any Members who are not on the committee be allowed to sit on the dais and participate in the hearing.

[No response.]

The CHAIRMAN. Without objection, so ordered.

We will now begin with the opening statements, and I will recognize myself for 5 minutes.

#### **STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON**

The CHAIRMAN. The committee meets for the second time this year to consider a number of legislative proposals relating to the Endangered Species Act, or ESA, a law that has not been reauthorized for over 25 years, and which, I might add, has a recovery rate of less than 2 percent.

Over the past 3 years, the committee has held numerous oversight hearings about this administration's lack of ESA data transparency, inadequate deference to states, local, county governments, and private property owners, and costly serial litigation and closed-door settlements with certain groups that are forcing hundreds of new listings and millions of acres of habitat designations. I am pleased that the House took an important step forward to address these issues in July with H.R. 4315, which passed with bipartisan support.

The bills before us today are not the only solutions to ESA issues. But these bills do demonstrate a continuing and growing awareness that ESA, as it currently exists, is not serving the people or species well—not just in the West, but in many other areas of the country, as well.

Among other things, these bills would instill greater transparency, more accurate economic analysis, counting of species, adding sunshine to sue-and-settle policies, and greater deference to states that are already conserving species. In short, they are a sampling of ideas that follow a number of recommendations in-

cluded in a report released earlier this year by the ESA Congressional Working Group that was co-chaired by myself and Mrs. Lummis of Wyoming.

Some who are opposed to any changes in ESA will undoubtedly claim that ESA is working to support the Obama administration's executive orders and sweeping Federal ESA administrative rules that impose control over states' conservation plans. They also think that the Federal Government's unpublished studies or opinions are better than actual transparent data.

Earlier this year, despite Federal endorsement of a comprehensive five-state plan designed to manage and keep the lesser prairie chicken off the list, the Fish and Wildlife Service listed it anyway, showing it was more fearful of environmental litigation, it appears, than giving the states a reasonable amount of time to let their plan work. Many in the 200 million acres affected by a potential listing next year of the greater sage grouse fear the same thing will happen to them.

While it appears this administration has made it a primary priority to settle with environmental groups, setting arbitrary deadlines for hundreds of ESA listing decisions, they have repeatedly ignored ESA's statutory deadlines for their own delisting proposals. One such case in that category is the listing of the gray wolf.

To make matters worse, the administration proposed three Federal regulations that could be finalized next month, which would radically change how they designate critical habitat, nationwide. Concerns have been raised that these rules, if enacted, would give the Services sweeping discretion to designate habitat for areas where a species may be present only seasonally or not at all, and could make it more difficult for private, state, and local entities to conserve sufficiently to be exempted from such designations.

So, this hearing is another hearing in the process to find solutions to an Act that I had mentioned has not been reauthorized for 25 years.

[The prepared statement of Mr. Hastings follows:]

PREPARED STATEMENT OF THE HON. DOC HASTINGS, CHAIRMAN, COMMITTEE ON  
NATURAL RESOURCES

The committee meets for the second time this year to consider a number of legislative proposals relating to the Endangered Species Act (ESA), a law that has not been reauthorized in over 25 years, and which has a less than 2 percent recovery rate.

Over the past 3 years, the committee has held numerous oversight hearings about the Obama administration's lack of ESA data transparency, inadequate deference to states, local county governments and private property owners relating to ESA decisions, and costly serial litigation and close-door settlements with certain groups that are forcing hundreds of new listings and millions of acres of habitat designations. I am pleased that the House took an important step forward to address those issues in July with H.R. 4315, which passed with bipartisan support.

The bills before us today are not the only solutions to ESA issues, but these bills demonstrate a continuing and growing awareness that ESA as it currently exists is not serving people or species well, not just in the West, but in many other areas of the country as well.

Among other things, these bills would instill greater transparency, more accurate economic analyses, counting of species, adding sunshine to ESA "sue and settle" policies, and greater deference to states that are already conserving species.

In short, they are a sampling of ideas that follow a number of recommendations included in a report released earlier this year by the ESA Congressional Working Group I co-chaired with Representative Lummis and a number of Members representing districts affected by ESA around the country.

Some of those opposed to any changes to ESA will undoubtedly claim the ESA is working and support the Obama administration's executive orders and sweeping Federal ESA administrative rules that impose control over states' conservation plans. They also think that the Federal Government's unpublished studies or opinions are better than actual transparent data.

Earlier this year, despite Federal endorsement of a comprehensive five-state plan designed to manage and keep the Lesser Prairie Chicken off the list, and despite improved numbers, the Fish and Wildlife Service listed it anyway, showing it was more fearful of environmental litigation threats than giving the states a reasonable amount of time to let their plan work. Many in the 200 million acres affected by a potential listing next year of the Greater Sage Grouse fear the same will happen there.

While it appears the administration has made it a primary priority to settle or bow to environmental groups and setting arbitrary deadlines for hundreds of ESA listing decisions, at the same time, they have repeatedly ignored ESA's statutory deadlines for their own delisting proposals, such as in the case of the gray wolf.

To make matters worse, the administration proposed three Federal regulations that could be finalized next month which would radically change how they designate critical habitat nationwide. Concerns have been raised that these rules, if enacted, would give the Services sweeping discretion to designate habitat for areas where a species may be present only seasonally, or not at all, and could make it more difficult for private, state and local entities to ever conserve sufficiently to be exempted from such designations.

Clearly, ESA as written and implemented can be improved upon, and I look forward to hearing from the witnesses on the bills before us today that will begin to do that, and continue a discussion on sound legislative updates and improvements that I expect will continue well beyond this Congress.

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The CHAIRMAN. And, with that, I will yield back my time and recognize the Ranking Member for his statement.

**STATEMENT OF THE HON. PETER DEFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON**

Mr. DEFAZIO. Thank you, Mr. Chairman. Well, welcome back to unreality, inside the Beltway. The week before we adjourned we spent quite some time on the Floor on a number of so-called Endangered Species Act reforms. Perhaps the most nonsensical of those was the one that said that any data submitted by any tribe, county, state, or city would be deemed to be the best available scientific and commercial data.

Of course, as I pointed out at the time, there is a real-time conflict between Oregon and Washington about spills on the Columbia River, ongoing litigation, and it has been going on over more than a decade, which has, potentially, critical impact on rate-payers in the Pacific Northwest. And both would have the best available commercial and scientific data.

Now, I guess what we are really trying to do here is engender more litigation, and I see that in a number of the bills before us today.

As the Chairman pointed out, the Act has expired, and I do agree that the Act needs to be updated with what we have learned in the last 50 years or so about dealing with endangered species, particularly those which share a habitat. And we should be taking a more comprehensive, multi-species, ecosystem-based approach.

But none of these bills before us today would lead in that direction. One would create even more confusion when it comes to the idea of the best available science and data being anything submitted by any of those jurisdictions I previously mentioned. But

now we are going to have yet a new way of determining what is the best scientific data, which would, of course, contradict the bill that just passed the House last week, or last month, which isn't going anywhere.

But here we are again today, to see if we can waste some more time. Meanwhile, the West is on fire, the Forest Service has notified us that they will run out of money in the very near future. What that means is they will borrow from their fuel reduction accounts and stop projects that could mitigate or prevent or lessen the severity of future fires.

There is bipartisan, bicameral legislation that is supported by the President of the United States, probably the rarest damn thing around here, rarer than any of the endangered species we are talking about, something that Democrats, Republicans, House, Senate, and the President agree on, which is a better way to deal with these fires, to give them, the Forest Service and the BLM, the tool they need over time. This committee has not seen fit to hold a single hearing on this issue, not one. But here we are on the 5th, 10th, or 27th hearing on ESA-gutting bills that are going nowhere.

Now, you know, I just spent 5 weeks of reality, and now we are back inside the Beltway. It is very unfortunate for the American people that the reality that I assume other Members heard, they are members of this committee who are cosponsors of that bipartisan bill so that the Forest Service won't run out of money and gut their fuel reduction, and fuel management, forest health budgets every year, and other programs, and prevent and help deal with this problem long-term, who are not on the discharge petition to move that bill to the Floor of the House, over the objections of all the Republican leadership.

Now, it is time to deal with real things that really help the American people. Yes, the Endangered Species Act needs updating. None of this here today is a real thoughtful approach to that. And I am sorry we are wasting everybody's time.

With that, I yield back the balance of my time.

The CHAIRMAN. I thank the gentleman for his statement, and I am glad that he is here, however, notwithstanding some of his observations, but that is part of the political process, and I certainly recognize that.

I am pleased to welcome our first panel here. We have the Honorable Todd Staples, Commissioner with the Texas Department of Agriculture, from Austin, Texas; Mr. Randy Veach, President of the Arkansas Farm Bureau, from Little Rock, Arkansas; Mr. Robert Fischman, Professor of Law at the Indiana University Maurer School of Law in Bloomington; Mr. Gary Frazer, Assistant Director of Ecological Services for the U.S. Fish and Wildlife Service at the Department of the Interior, here in Washington, DC; and Mr. Tom Ray, the Water Resources Program Manager with Hicks-Ray Associates from Waco, Texas. And Mr. Ray, I understand, is also representing the Texas Water Conservation Association and the Western Coalition of Arid States.

Let me just, for those of you on the panel that have not had the opportunity to testify, explain how these timing lights work.

First of all, when you were asked to come, we asked you to submit a written testimony. That will appear in its entirety in the

record. And what I would like you to do is to keep your oral remarks within the 5-minute time frame.

Now, how the timing light works is that when the green light is on, that means, just like when you are traveling on the road, you are going very good. But when the yellow light comes on, that means caution. Time is running out. And then, when the red light comes on, that means either you speed up and go through the traffic light, or you terminate whatever you are talking about. Now, listen, try to keep it within 5 minutes. Obviously, we want to hear as much as we possibly can. But that is how the timing light works, and we very much appreciate your being here.

So, for the purpose of introduction, let me recognize my colleague from Texas, Mr. Neugebauer, who will introduce the first witness.

Mr. Neugebauer.

Mr. NEUGEBAUER. Thank you, Chairman Hastings, and thank you for holding this hearing. And I want to thank you for your work on the Endangered Species Act. I appreciate you including me on the working group. I think we had a very thoughtful discussion, and I think the product that came out of that has been very productive.

I also want to thank you for having a hearing today on my bill, H.R. 4284, which is the Endangered Species Improvement Act of 2014, which will really encourage greater state input and participation and authority. You know, section 6 of the Endangered Species Act already requires that the Fish and Wildlife work very closely with our states, and they should, because the outcomes that we have been achieving recently are not good. When you only have a 2 percent recovery rate, that is not a good thing.

I mentioned I was in a town hall meeting when I was traveling in August, and I said, "Imagine going to a doctor and needing a certain surgical procedure, and you ask the doctor what his outcome is, and he said, 'Well, 2 percent of the time I have a good outcome.' That is not a doctor that you are going to want to be doing your procedure." So, we have some work to do on the Endangered Species Act. And thank you, Chairman, again, for holding this hearing.

It is my pleasure to introduce my friend, the Texas Agriculture Commissioner Todd Staples, to testify before the committee today. Commissioner Staples is a distinguished public servant who is serving in his second 4-year term as leader of the Texas Department of Agriculture. He graduated from the A&M University with honors, and I don't hold it against him, as being a Red Raider, but he has also served in the Texas House and the Texas Senate, and has done a great job. He is our Ag. commissioner, and Commissioner Staples has been very involved in Texas' efforts to work with Fish and Wildlife on reasonable ways to protect our species.

And so, I am delighted to have him here today, and I appreciate him taking time out to testify before this committee.

The CHAIRMAN. Mr. Staples, you are recognized for 5 minutes.

**STATEMENT OF TODD STAPLES, COMMISSIONER, TEXAS  
DEPARTMENT OF AGRICULTURE, AUSTIN, TEXAS**

Mr. STAPLES. Thank you. Good morning, Chairman Hastings and Ranking Member DeFazio and members of the committee. My

name is Todd Staples. I serve as the Texas Commissioner of Agriculture, and I appreciate the opportunity this morning to testify on behalf of Congressman Neugebauer's H.R. 4284, the ESA Improvement Act.

The ESA regulatory system has evolved, or more appropriately, I might say has devolved, into a rare conundrum where the burden of proof and related costs are placed on landowners and communities to prove that a regulatory action is not necessary, instead of placing that burden on the regulatory agency to prove the benefits of the regulations would outweigh those costs. This results in numerous regulatory burdens being enforced with certain costs, but obviously with obscure benefits.

Add to that the fact that activist groups are driving this regulatory scheme, and it is just not hard to see how the ESA, in its current form today, contradicts basic American scientific regulatory standards, as well as our basic sense of justice as costs are unnecessarily and unfairly shifted to private individuals in an attempt to achieve on what we all agree, I think, is a public good.

Even worse, though, than the cost-benefit discrepancy is how success is measured by the ESA. As, Mr. Chairman, you pointed out, and as Congressman Neugebauer has, since 1973 more than 1,500 domestic species have been listed for protection under the Act. Yet our success rate is a miserable 2 percent. If our goal is to preserve the species, shouldn't a measure of success be the number of species propagated to a delisting level?

Greater state and local authority over species and habitat management is one way to fix the ESA. Under the current law, activist groups have hijacked the process, while input from local, state, and regional officials, the very people impacted by the listing decisions, is not required for such action. This has led to burdensome and ineffective Federal management of species, while collaborative conservation efforts by states have been ignored.

Now, some may point out the circumstances where it appears that local input has been adopted. But I must point out that protecting our plants and animals, and, very importantly, moving them to a recovered status, cannot be successful under the adversarial process that it has become today.

As all biological systems are in flux, local authorities and scientists can respond more effectively and more efficiently to the constant changes with species ecosystems. I support the reforms put forth in H.R. 4284 that would require U.S. Fish and Wildlife to coordinate with interested states on a State Protective Action (SPA) and approve, if it meets established criteria.

SPAs would preclude the need for a listing in many circumstances, and keep species management authority at the state and local level, where stakeholders and species can simultaneously be better protected.

The saga of the lesser prairie chicken, I think, is a prime example of what an SPA could prevent in the future. Despite years of painstaking work, including millions of dollars and acres invested in range-wide conservation plan, this March the Service proceeded to list the chicken as threatened under the ESA. Stakeholders in five states were shocked, given the Service issued a press release back in October of 2013 touting their plan as "a model for state

leadership and conservation of a species proposed for listing under the ESA.” It is clear that the system simply isn’t working if voluntary conservation plans that are actually supported by the Service is not enough to prevent a listing.

We have seen success in Texas with landowner-led initiatives such as the Texas Recovery Credit system that brought together an adverse group of individuals that worked collaboratively.

And I must say that the Service is overwhelmed by litigation. We are here to say that states are ready to lead. Our state is sincerely committed to sustainable stewardship that balances survival of both man and our resources in a manner that does not punish landowners, and doesn’t violate their constitutional rights, but we desperately need congressional help to make this happen.

And thank you for the opportunity to be with you today.

[The prepared statement of Mr. Staples follows:]

PREPARED STATEMENT OF TODD STAPLES, TEXAS AGRICULTURE COMMISSIONER ON  
H.R. 4284

Good morning, Chairman Hastings, Ranking Member DeFazio and members of the committee. My name is Todd Staples, and I serve as the Texas Agriculture Commissioner. Thank you for the opportunity to testify on Congressman Neugebauer’s H.R. 4284, the “ESA Improvement Act of 2014.”

I commend and appreciate the leadership of Chairman Hastings and the members of the House Committee on Natural Resources in their pursuit of reforming the Endangered Species Act (ESA).

The ESA regulatory system has evolved into a rare conundrum where the burden of proof, and related costs, is placed on landowners or communities to prove a regulatory action is not necessary; instead of placing that burden on the regulatory agency to prove the benefits of the regulations would outweigh the costs. This results in numerous regulatory burdens being enforced with certain costs but obscure benefits. Add to that the fact that activist groups are driving this regulatory scheme and it’s not hard to see how the ESA, in its current form, contradicts basic American scientific regulatory standards, and our basic sense of justice as costs are unnecessarily and unfairly shifted to private individuals in an attempt to achieve a public good.

Even worse than the cost-benefit discrepancy is how success is measured by ESA. Since 1973, more than 1,500 domestic species have been listed for protection under ESA. Yet in that same time, less than 2 percent of species have been de-listed. If our goal is to preserve species, shouldn’t a measure of success be the number of species propagated to a de-listing level?

The vast Texas landscape is rich and diverse, and our citizens have long taken tremendous pride in protecting our cherished natural resources. Approximately 95 percent of Texas land is privately owned. Texas leads the Nation with over 130 million acres devoted to farms and ranches. Our landowners are responsible for managing the natural resources, which help sustain our state’s population of 26 million; feed and clothe the world; provide a healthy environment; and create the jobs that power our dynamic economy. In Texas, we believe in sound decisionmaking, private property rights and the fact that government is not the answer to every problem. Over time, ESA has evolved to conflict with these principles and has been a source of concern for Texans for decades.

Greater state and local authority over species and habitat management is one way to fix the ESA. Under the current law, far flung activist groups have hijacked the process of listing species as endangered. At the same time, input from local, state, and regional officials—the very people impacted by listing decisions—is not required for such action. Activists have successfully gamed the system. This has led to burdensome and ineffective Federal management of species, while collaborative conservation efforts by states have been ignored. Local, state and regional officials are better equipped and should be given the opportunity to coordinate species management efforts with stakeholders.

As all biological systems are in flux, local authorities and scientists can respond more quickly and effectively than the Federal Government to the constant changes with the endangered and threatened species ecosystems. This is better for the species, too, as local residents and authorities know the species best.

I support the reforms put forth in H.R. 4284 that would require the U.S. Fish and Wildlife Service (FWS) to coordinate with interested states on a “State Protective Action” (SPA) and approve it if it meets established criteria. SPAs would preclude the need for a listing in many circumstances and keep species management authority at the state and local level where stakeholders and species can be simultaneously better protected.

The saga of the Lesser Prairie-Chicken (LPC) is a prime example of what an SPA could prevent in the future. Despite years of painstaking work by states, municipalities, farmers, ranchers, energy developers, including millions of dollars and acres invested into a range-wide conservation plan, this March FWS proceeded to list the LPC as threatened under ESA. Stakeholders in Texas, New Mexico, Oklahoma, Kansas and Colorado were shocked given FWS issued a press release back in October 2013 touting their plan as “a model for state leadership in conservation of a species proposed for listing under the ESA.” It’s clear the system isn’t working as designed if voluntary conservation plans like the range-wide plan, which was supported by FWS, is not enough to prevent a listing.

Looking back, Texas appears to have dodged a bullet in 2012 when industry and private landowners developed a conservation agreement for the Dunes Sagebrush Lizard (DSL). This agreement was approved by FWS. Fortunately, state and agriculture stakeholders, along with the oil and gas industry, partnered together to invest in a study that followed scientific processes and identified previously unknown areas of habitat for the DSL. This study demonstrated to FWS that the call for listing the DSL as endangered was both unfounded and unwarranted. Texas leads the United States in the production of crude oil with 36 percent of total U.S. production. The listing of the DSL would have been devastating not just to our economy, but to every American worker who pays a gas bill every month.

Currently, more than a hundred species of plants and animals are listed as federally threatened or endangered in Texas. Alarming, our state could experience a dramatic increase in listings in the coming years. Seventy-seven species in Texas are presently being considered for listing, meaning future designations could result in large swaths of Texas being declared habitat for endangered or threatened species, resulting in one of the largest land and water grabs in modern times. With a history that includes decimation of agriculture to protect the spotted owl and the delta smelt, the time for Congress to stop the abuse of ESA is now. In fact, it’s never been more pressing.

Texas will have a difficult time enduring the burden of regulation and possibility of over-litigation should the endangered species list grow. In 2010, Texas was sued by a group alleging a “taking” of the endangered whooping crane during the 2008–2009 drought. Ultimately, the defendants—the Texas Commission on Environmental Quality, Guadalupe-Blanco River Authority (GBRA), San Antonio River Authority and the Texas Chemical Council—spent millions of dollars in legal fees and thousands of man-hours defending the state’s water system and the rights of the water users against this frivolous claim, and ultimately prevailed. This is a crystal clear example where there was zero benefit for a species and outrageous expenses to taxpayers. The time and money spent in this one case could have gone toward proven species management practices and prosecuting true violations of environmental laws.

We have seen success with state- and landowner-led conservation efforts. A prime example of state-led conservation is the Recovery Credit System for the endangered golden-cheeked warbler. The Texas Department of Agriculture convened a working group in 2005 in response to a FWS Biological Opinion, which recommended Fort Hood’s participation in an offsite conservation program. Fort Hood maintains programs to protect habitat on base. However, training activities inherently risk destroying surrounding habitat. To mitigate such losses, a recovery credit system was developed where private landowners with qualifying habitat in surrounding counties enter into contracts and work with specialists to determine species management practices for the enhancement of suitable golden-cheeked warbler habitat. I might point out this process brought together a diverse group of stakeholders who often have adverse opinions but the process allowed for constructive collaboration to address a challenge that resulted in a benefit to the species and, remarkably, landowners volunteering to collaborate.

The fact is that Texas landowners understand the value of natural resource preservation. Take the exotic wildlife managers and their actions toward the scimitar-horned oryx, addax and dama gazelle. Near extinction in their native Africa, the three antelopes have thrived under the management of Texas ranchers and to the benefit of wild populations. In 1979, there were 32 scimitar-horned oryx in a Texas breeding program. Since then, that number increased to approximately 9,000 animals. The population of addax has grown from two known animals in 1971 to more

than 4,000. Less than 10 dama gazelles were in Texas in 1979; propagation efforts by private landowners have resulted in a population growth to close to 900 today.

While FWS is overwhelmed by litigation, states and landowners are eager to lead. I strongly encourage FWS to work with state and local leaders to ensure that proper species management throughout Texas and the Nation.

I applaud the committee's work on H.R. 4284 as well as H.R. 4315, the "Endangered Species Transparency & Reasonableness Act" which passed the House in July. As your committee continues to discuss ways to improve species conservation, I support legislative efforts that aim to:

- Revise the provisions of ESA to establish a more rigorous scientific data threshold in determining the status of a species.
- Ensure the party initiating a listing is responsible for demonstrating the need for such designation. This contrasts with current practices in which property owners facing the regulations that accompany a listing carries the burden of proving a species is not threatened or endangered.
- Require flexibility in conservation plans so all stakeholders impacted by a species listing have the opportunity to benefit from and participate in activities that protect and promote the targeted species.
- Prevent Federal agencies from settling listing lawsuits without the consent of affected parties.
- Reform the Equal Access to Justice Act to prevent abuse by activist groups and establish a "loser pays" clause to prevent frivolous lawsuits.
- Provide a clear process for analyzing the costs and benefits of a listing during the initial stages of the process. This analysis should demonstrate that the objective, quantifiable benefits of listing a species outweighs the cost of implementation and the restrictions placed on affected stakeholders.
- Prohibit FWS from regulating activities that lead to the propagation of the species.
- Refocus ESA on species recovery and proliferation.

In closing, I urge Congress to take action to provide true relief to the people of Texas and the United States. Compared to other states, Texas has a broad variety of ecosystems. From coastal prairies to pine forests to deserts and mountains, our ecological profile is enormous. Our state is sincerely committed to responsible and sustainable stewardship of plants and animals that balances survival of both man and our environment, and in a manner that does not punish individual landowners, and violate their constitutional rights.

Thank you for the opportunity to appear before you today.

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The CHAIRMAN. Mr. Staples, or Commissioner Staples, thank you very much for your testimony. I would now like to recognize my colleague from Arkansas for the purposes of an introduction.

Mr. CRAWFORD. I thank the Chairman. I would also like to ask unanimous consent that I submit an opening statement for the record.

[No response.]

The CHAIRMAN. Without objection, it will be part of the record.  
[The prepared statement of Mr. Crawford follows:]

PREPARED STATEMENT OF THE HON. RICK CRAWFORD, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF ARKANSAS ON H.R. 4319

Thank you Chairman Hastings.

Last year I learned that a significant portion of the waterways in my district could be designated Critical Habitat for the Rabbitsfoot and Neosho Mucket Mussels. I also learned at the time that the U.S. Fish and Wildlife's economic impact study of such a broad designation, with the potential to affect tens of thousands of my constituents and countless farms, small businesses and municipalities, would be entirely made up of only the cost of the Government consulting with itself on compliance. There would be no consideration for the potential loss of the use of water and of activities, such as farming and manufacturing, which use water or the waterways falling under this designation. There would be no examination of wheth-

er this broad designation would cost the people and businesses of my district the loss of the use of the land, the loss of their jobs, the threat of increased costs, none of that would be considered. I believe this so-called “incremental” approach formally adopted by the U.S. Fish and Wildlife Service, which basically measures the cost of paperwork and bureaucracy, hides the real economic impact of designations from the American public and completely fails to provide the needed data to measure and reveal the true cost to lives and livelihoods against the relative benefit gained.

It has not always been this way. Both the U.S. Fish and Wildlife Service and the National Oceanic Atmospheric Administration’s Fisheries Service, the two agencies who administer the Endangered Species Act, have used a more comprehensive approach in the past that measures the true cost of designating particular areas in terms of loss of use, increased costs and loss of jobs. This so-called “cumulative” approach gives a true picture of the cost of designating a particular area as critical habitat, and permits an accurate and transparent measure of the cost versus the benefit of designating a particular area.

In response to this news, I submitted legislation called the “Common Sense in Species Protection Act,” which calls not only for the true measure of the cost of a designation on lives and livelihoods, but for that cost to be considered when making designations. The legislation, H.R. 4319, has two significant components.

First, H.R. 4319 requires the Secretary of the Interior to consider economic impact when designating areas within a proposed critical habitat designation. The Endangered Species Act gives the Secretary the option of considering the economic impact when designating, and when considering whether to include or exclude areas from a critical habitat designation. H.R. 4319 simply changes “may” to “shall,” in effect *requiring* the Secretary to consider the economic impact. The language in H.R. 4319 however **does not change the provided exclusion** from considering economic impact should the Secretary determine that the extinction of the species is at risk.

Second, the bill requires the administering agencies to use the Cumulative rather than the Incremental method to calculate the economic impact of proposed critical habitat designations. The cumulative method embodied in H.R. 4319 considers the true costs to the lives and livelihoods of those who live and work within a proposed designation, and presents a much more transparent picture of the true cost of species protection. Certainly more so than the administering agencies’ current method, the so-called incremental method, which basically counts the cost of one government agency conferring with another. This requirement is not a radical departure; the administering agencies have used both methods, and variations of both, over the past 40 years.

Thank you again Chairman Hastings and members of the committee for holding this hearing on H.R. 4319, and for all of the witnesses that will appear here today to bring to light the serious need for reform in how we protect and preserve our natural resources.

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Mr. CRAWFORD. Again, thank you, Mr. Chairman. I would like to welcome Randy Veach, President of Arkansas Farm Bureau, and thank him for coming here today to testify regarding H.R. 4319, the Common Sense in Species Protection Act.

Randy Veach is in his sixth term as Arkansas Farm Bureau President, having previously served 5 years as the organization’s vice president, and on the State Board of Directors since 1999. A third-generation farmer in northeast Arkansas, he and his wife, Thelma, raise cotton, rice, soybeans, wheat, and corn, along with their son, Brandon on farmland cleared by Randy’s grandfather and father.

Mr. Veach serves as a member of the American Farm Bureau Board of Directors, and has been involved with agricultural trade missions to Mexico, China, Panama, South Korea, and Japan. He leaves later this week for a trip to Belgium and Switzerland to meet with trade officials from the European Union.

I think it is critically important that we hear and understand how policies coming out of Washington, DC affect the lives and

livelihoods of those living outside the beltway, and I want to thank Mr. Veach for coming here today to help us understand the real need for common-sense Endangered Species Act reform.

And, with that, I yield back.

The CHAIRMAN. Mr. Veach, you are recognized for 5 minutes. And thank you for being here.

**STATEMENT OF RANDY VEACH, PRESIDENT, ARKANSAS FARM BUREAU, LITTLE ROCK, ARKANSAS**

Mr. VEACH. Mr. Chairman and members of the committee—

The CHAIRMAN. Pull that a little bit closer, if you would.

Mr. VEACH. Sure. Is that better?

The CHAIRMAN. I bet you are going to start, “Mr. Chairman.” Go right ahead.

[Laughter.]

Mr. VEACH. All right. Mr. Chairman and members of the committee, thank you for the opportunity to be with you this morning. I applaud your efforts to look deeper into the overreach of rule-making authority being used by some agencies to amend the Endangered Species Act. As Congressman Crawford said, I am a farmer from northeast Arkansas, and I sure am happy to be here to be able to talk to you.

On behalf of the farmers and ranchers in Arkansas and across the Nation, I want to express Farm Bureau support for Congressman Crawford’s bill, H.R. 4319, the Common Sense in Species Protection Act of 2014.

This regulation would require Federal agencies to first perform a complete analysis of the economic impacts of the lives and livelihoods of those who live, work, and raise families in an area before it is possible to declare those areas as critical habitat. Mr. Chairman, I commend your leadership in bringing all of us together to address legislation that would provide some balance to the way Federal agencies are now using this law.

Let me be blunt. In my view, the species most threatened here is the American farmer and rancher. We are being marginalized right out of business by overreaching from Federal agencies acting beyond the intentions of Congress. These actions jeopardize the economic stability of the Nation’s agricultural economy.

Four decades ago, the men and women of Congress passed the Endangered Species Act. We now need Congress to exercise some common sense and fix these problems.

To be clear, Farm Bureau supports the Endangered Species Act for the protection of legitimately threatened species. However, expansion of the law without considering the full economic consequences is detrimental to an industry that provides the food, the fiber, and the shelter for our country in a major portion of the world.

Current regulations allow Federal agencies to only include costs between Federal agencies when identifying the costs of critical habitat designations. This is a reckless approach. The only way to understand the full costs of critical habitat designations is to have a completely transparent economic impact study, subject to public comment, well in advance of these declarations. Congressman Crawford’s bill does that very thing.

We hear a lot of these days about sustainable agriculture, and many people trying to make a definition for sustainable agriculture. But I can tell you if we are not profitable, we are not sustainable. And if we are not sustainable, neither is the food, fiber, and shelter that you have become so used to.

But an overzealous enforcement of Federal laws hinder, disrupt, and further burden our farmers and ranchers. We will not be able to sustainably raise the crops and livestock necessary to feed the 7 billion people currently on our planet, much less the 9 billion projected by 2050.

Allow me to address the specific situation in Arkansas, where a proposal to create critical habitat for a pair of aquatic species, the Neosho Mucket and the Rabbitsfoot mussel, threatens to clamp down on Arkansas' farmers and ranchers. This proposed habitat listing will have a negative impact on the repair and maintenance of farm-to-market roads and bridges, and on economic development activities, and exert severe restrictions on construction and development projects.

In Arkansas, the proposed designation for these two mussels would include 31 of our state's 75 counties, and would affect nearly 42 percent of the state's watershed. There are nearly 770 waterway miles in our state connected to this proposed critical habitat designation. Roughly 90 percent of these river miles pass through private property, disproportionately impacting productive land.

In this proposed area there are 21,000 family farms, 7.4 million acres of farmland, 8.6 million acres of forest land, \$2.9 billion of agricultural economy, annually. Farmers in these areas produce 78 million broiler chickens, 6 million laying hens, beef cattle by the tens of thousands, 600,000 acres of rice, 780,000 acres of soybeans. Again, we must consider the impact to the lives and livelihoods of those who live, work, and raise families in these areas.

We believe the proposed critical habitat designation will lead to unwarranted litigation against private landowners. There is little risk placed on those who file these lawsuits, since the ESA picks up the taxpayer dollars to cover those legal fees. But the government never picks up the cost of private landowners who have to defend the use of their property and the way they are using it.

There are several examples of agency overreach where private lands would be overburdened by the critical habitat designation. Much of the reason—

The CHAIRMAN. Mr. Veach, would you please summarize? Your time has expired. Again, your full statement is in the record, so if you would summarize—

Mr. VEACH. All right.

The CHAIRMAN [continuing]. Here in the next 10 seconds, I would appreciate it.

Mr. VEACH. OK. These tactics have changed and threatened the endangered species listing process, opening the door for the government.

In closing, I ask again for Congress to rein in those working around the intent of the Endangered Species Act and provide the American public full transparency to the true cost of the Endangered Species Act and proposed critical habitat designations.

If we don't, let me give you the bottom line on this. If we do not——

The CHAIRMAN. Mr. Veach, please, you are over and we do have two panels, and we want to give everybody an opportunity.

Mr. VEACH. All right.

The CHAIRMAN. So please close.

Mr. VEACH. The security of the supply of our food, fiber, and shelters is threatened, and so is our national security.

Thank you for your time. God bless you and your families, and God bless the farmers and ranchers.

[The prepared statement of Mr. Veach follows:]

PREPARED STATEMENT OF RANDY VEACH, PRESIDENT, ARKANSAS FARM BUREAU ON  
H.R. 4319

Mr. Chairman and members of the committee, thank you for the opportunity to be with you this morning. I applaud your efforts to look deeper into the over-reach of rulemaking authority being used by some agencies to amend the Endangered Species Act.

As Congressman Crawford said, my name is Randy Veach and I am a cotton, soybean, corn and rice farmer from northeast Arkansas.

On behalf of our farmers and ranchers in Arkansas and across the Nation, I want to express Farm Bureau's support for Congressman Crawford's bill, H.R. 4319, the "Common Sense in Species Protection Act of 2014." This legislation would require Federal agencies to first perform a complete analysis of the economic impacts on the lives and livelihoods of those who live, work and raise families in an area before it is possible to declare those areas as critical habitat.

Mr. Chairman, I commend your leadership in bringing all of us together to address legislation that would provide some balance to the way Federal agencies are now using this law.

Let me be blunt; in my view, the species most threatened here is the American farmer and rancher. We are being marginalized right out of business by over-regulation from Federal agencies acting beyond the intentions of Congress. These actions jeopardize the economic stability of the Nation's agricultural economy.

Four decades ago, the men and women of Congress passed the Endangered Species Act. We now need Congress to exercise some common sense and fix these problems.

To be clear, Farm Bureau supports the Endangered Species Act for the protection of legitimately threatened species. However, expansion of the law without first considering the full economic consequences is detrimental to an industry that provides food, fiber and shelter for our country and a good portion of the world.

Current regulations allow Federal agencies to only include the consultation costs between Federal agencies when identifying the "costs" of critical habitat designations. This is a reckless approach.

The only way to understand the full costs of critical habitat designations is to have a completely transparent economic impact study, subject to public comment, well in advance of these declarations.

We hear a lot these days about sustainable agriculture, which, to me, means a readily available supply of food. The farmers and ranchers who supply this food are sustainable only when we can profitably remain in business. But, if over-zealous enforcement of Federal laws hinder, disrupt or further burden our farmers and ranchers, we will not be able to sustainably raise the crops and livestock necessary to feed the 7 billion people currently on our planet, much less the 9 billion projected by 2050.

Allow me to address the specific situation in Arkansas, where a proposal to create critical habitat for a pair of aquatic species—the Neosho Mucket and the Rabbitsfoot mussel—threatens to clamp down on Arkansas' farmers and ranchers. This proposed habitat listing will have a negative impact on the repair and maintenance of farm-to-market roads and bridges, on economic development activities, and exert severe restrictions on construction and development projects.

In Arkansas, the proposed habitat designation for these two mussels would include 31 of our state's 75 counties and would affect nearly 42 percent of the state's watershed.

There are nearly 770 waterway miles in our state connected to this proposed critical habitat designation. Roughly 90 percent of these river miles pass through private property, disproportionately impacting productive land.

In this proposed area there are 21,000 family farms, 7.4 million acres of farmland, 8.6 million acres of forestland and \$2.9 billion of agricultural income. Farmers in these areas produce 78 million broiler chickens, 6 million laying hens, beef cattle by the tens of thousands, 600,000 acres of rice and 780,000 acres of soybeans.

A recent study conducted by the University of Arkansas at Little Rock estimated the cost of the habitat designation in Arkansas alone to be five (5) times the impact calculated by U.S. Fish and Wildlife Services for the 12 states included in this designation of these two aquatic species. Quite frankly, we expect the impact in Arkansas to be significantly higher, once the full cost of changes to best-management practices, unrealized opportunities and additional regulatory costs are included.

Again, we must consider the impacts to the lives and livelihoods of those who live, work and raise families in these areas.

We believe the proposed critical habitat designation will lead to unwarranted litigation against private landowners. There is little risk placed on those who file the lawsuit, since in many cases, the ESA provides taxpayer dollars to cover legal fees for those who file the lawsuit. The government never picks up the cost of the private landowner who has to defend the use of their property.

There are several examples of agency overreach, despite declarations that private lands would not be overburdened by the critical habitat designations.

Much of the reason we are here today defending the rights of American farmers is due to the current tactics employed by radical environmental groups. In 2011 two environmental groups negotiated a settlement agreement with the Fish and Wildlife Service and National Marine Fisheries Service that resulted in hundreds of new species listings across the Nation—potentially more than 300 species in the Southeast. With each listed species comes with the consideration of expansive and limiting regulatory burden of critical habitat designations.

These tactics have changed the threatened and endangered species listing process, opening the door for non-government organizations and third-party litigants to come into states nationwide to essentially extort private landowners through the threat of litigation.

In closing, I ask again for Congress to rein in those working around the intent of the Endangered Species Act and provide the American public full transparency to the true cost of the ESA and proposed critical habitat designations.

Thank you for your time.

God bless you and your families. God bless our farmers and ranchers. And God bless America.

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The CHAIRMAN. Thank you, Mr. Veach. Appreciate your testimony. And now I would like to recognize Mr. Robert Fischman, Professor of Law at Indiana University Maurer School of Law in Bloomington, Indiana.

You are recognized for 5 minutes.

**STATEMENT OF ROBERT L. FISCHMAN, PROFESSOR OF LAW,  
INDIANA UNIVERSITY MAURER SCHOOL OF LAW,  
BLOOMINGTON, INDIANA**

Mr. FISCHMAN. Thank you very much, Mr. Chairman, for the privilege of testifying today. In addition to being a professor of law at Indiana University, I am also a member scholar at the Center for Progressive Reform. I speak today on my own behalf, however, and not on behalf of either of those institutions.

My major message is that I think piecemeal fixes for particular species or particular projects will not improve the performance of the Endangered Species Act. They tend to skew priorities with temporary strategies. They increase the overall cost of administering the Act, usually without commensurate funding, micro-managing

risks, undermining this Congress' longstanding emphasis on science-based decisionmaking.

Instead, I propose more systematic reforms to make the aspirations of Congress in the Act a reality. The ESA works to prevent extinctions through data, best available technology. But that is not enough to ensure national conservation goals or minimize the costs of species protection. To accomplish those objectives, what we desperately need is legislation to promote the ecological health of the Nation.

Representative Neugebauer used an analogy to human health in the medical profession. I would say the Endangered Species Act is akin to a very crowded hospital emergency room, right, with a long wait. The most effective way of reforming the ESA is to provide treatment for species before their status is so dire. Programs like the State Comprehensive Wildlife Action Plans head off more listings, and are a bargain compared to the emergency treatment under the ESA.

Congress intended the ESA to conserve the ecosystems upon which imperiled species depend. And it is important to remember that we all depend on ecosystems for our health and prosperity.

In addition to the moral rationale for the Endangered Species Act, there are also, however, practical benefits. Mr. Veach mentioned the freshwater mussels. My part of the Midwest, in Indiana, also hosts listed freshwater mussels, as does the State of Ohio. And like canaries in coal mines, freshwater mussels are telling us something about excess nutrient runoff. That is the problem that ultimately shut down the water supply of Toledo for several days this summer.

It is not easy to get a handle on unsustainable farming practices, but the ESA forces us to make some very difficult choices. Therefore, the Act takes a lot of heat.

The problem is, by the time a species gets listed, populations are already so depleted that there remains little flexibility for further declines. But most declining species in the United States are not on the brink of extinction. A conservation program for sustaining these species could succeed with much greater flexibility than the ESA.

If we had a set of programs to slow unsustainable practices before biodiversity reached the point of potential collapse, we would avoid many of the train wrecks that have tarnished the image of the ESA. We ought to rely on it less, and more on preventative initiatives, just as we do in the field of public health.

One great opportunity for prevention is funding the comprehensive wildlife action plans that now every state has in place. Avoiding new ESA listings is a foundational purpose for each of these plans, which Congress encouraged through a grant program. The action plans provide states with flexibility on setting priorities to avoid listings through programs of their own choosing. Federal appropriations to assist states in carrying out their plans currently amount to less than \$1 million per state per year. They are decreasing over time. Funding the plans would require about a 10- to 20-fold increase, a relatively small amount of money to head off much more expensive ESA challenges, where recovery costs are estimated to be in the billions of dollars.

Now, I understand this committee does not directly control purse strings, but it certainly can avoid making the triage situation for the ESA worse through delayed listings and unfunded agency procedures.

Let me just conclude by saying that conservation success will require comprehensive legislative reform, more appropriations for the agencies charged with implementing the Endangered Species Act, and vigilant citizens policing compliance with the Act.

I am happy to answer any questions you have about my statement, or how it relates to the particular bills the committee is considering. Thank you for your time.

[The prepared statement of Mr. Fischman follows:]

PREPARED STATEMENT OF ROBERT L. FISCHMAN, PROFESSOR OF LAW, INDIANA  
UNIVERSITY MAURER SCHOOL OF LAW

My name is Robert L. Fischman. I am a Professor of Law at the Indiana University Maurer School of Law. I am also a member scholar of the Center for Progressive Reform. Thank you for inviting me to testify. I am testifying today on my own behalf; the views I express should not be attributed to any organization with which I am affiliated. A copy of my curriculum vitae is attached to this testimony as Appendix A. I also include a brief biographical paragraph in Appendix B. I have written about and taught the Endangered Species Act (ESA) for over two decades. My publications are listed in the vitae.

The statement that follows reflects my view that piecemeal fixes for particular species or projects will not improve the performance of Federal agencies in meeting the objectives of the ESA. There are just too many individual issues and site-specific reforms, such as the carve-outs for certain water projects in H.R. 1927 and H.R. 4866's reversal of the lesser prairie chicken listing, which tend to skew priorities with temporary strategies. Piecemeal legislation and micro-management of agencies risk undermining this Congress' longstanding emphasis on science-based decisionmaking.

Instead, I propose more systematic reforms to make the aspirations of Congress in the ESA a reality. The ESA today is an indispensable tool of Federal biodiversity conservation, but it can work better.

I. THE ENDANGERED SPECIES ACT SHOULD BE A LAST RESORT FOR CONSERVATION, NOT  
THE PRINCIPAL TOOL

Though Congress intended the ESA to conserve "the ecosystems upon which" imperiled species depend,<sup>1</sup> the act almost exclusively focuses on preventing species from going extinct. By the time species are listed for protection under the ESA, populations are already so depleted that there remains little flexibility for further declines. The famous inflexibility of the Act, to "halt and reverse the trend toward species extinction, whatever the cost,"<sup>2</sup> is borne of the emergency situation facing a species when it declines to the very brink of extinction. Isolated fragments of habitat, low genetic diversity, and precious few populations raise the costs of conservation and heighten the consequences of failure.

The most effective step Congress could take to improve the track record of the ESA and reduce conflicts about its application is to enact comprehensive biodiversity protection legislation. Most declining species in the United States are *not* on the brink of extinction. A conservation program for sustaining these species could succeed with much greater flexibility than the ESA. The ESA often demands modification of commercial activities because we do not take reasonable measures until species are at a relatively high risk of extinction. If we had a set of programs to slow unsustainable practices before biodiversity reached the point of potential collapse, then we would avoid many of the train wrecks that have tarnished the image of the ESA. It is a program of last resort, and we ought to rely less on the ESA and more on preventive biodiversity health initiatives to address ecological integrity.

For instance, it can be difficult to promote both economic development and species protection when very little habitat remains. The larger the area, the more feasible trade-offs become. Early planning, before every last scrap of habitat is needed for a species to cling to existence, enables more flexibility and can distribute the costs

<sup>1</sup> 16 U.S.C. § 1531(b).

<sup>2</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

of species protection more evenly. Some candidate conservation agreements include this kind of flexible approach, but they tend to be developed when it is too late to realize their potential because species populations are too small. We need legislative incentives to engage in such planning before a species is on the verge of listing.<sup>3</sup>

Preventive ecological health to avoid ESA listing also requires information. Without information about the location, vigor, trends, and needs of species, we have little hope of avoiding endangerment. Most species' range-wide status is not tracked by any agency, state or Federal. Scientists are currently at work on a promising national conservation-support network.<sup>4</sup> This is one model Congress could endorse, as it would establish the scientific data needed to support preventative ecological health.

## II. THE ENDANGERED SPECIES ACT NEEDS MORE FUNDING FOR EFFECTIVE IMPLEMENTATION

The ESA has never received adequate funding to fulfill its objectives, and recent budgets have intensified the problem. Much of the litigation that entangles the U.S. Fish and Wildlife Service (FWS) seeks to enforce clear statutory deadlines in cases where there is not much dispute over the meaning of the law. The listing agencies are simply unable to comply with the demands of the ESA because they do not possess the resources to keep pace with a flow of species declines that promises only to get worse. Limiting judicial review would not help the agencies meet their congressional mandates. The real solution is to give the agencies funding to carry out species listing, critical habitat designation, recovery planning, interagency coordination, and enforcement.

Funding implementation of the ESA *now* will be much cheaper than continuing on the current course of inadequate responses to the extinction crises. Unless we can *prevent* further listings through conservation and address imperiled species needs for recovery *early*, we will experience more massive, expensive train wrecks like the disputes over the Columbia and San Joaquin Rivers. The states understand this and have made great strides in planning for preventive conservation. Congress should encourage states with more grants, as noted below. This is a classic case where an ounce of prevention is worth a pound of cure.

Habitat acquisition combats the leading cause of species imperilment, habitat loss,<sup>5</sup> and has been a key element of Federal efforts to prevent extinctions since the time of Congress' very first endangered species legislation in 1966.<sup>6</sup> Unfortunately, the centerpiece for funding this tool, the Land and Water Conservation Fund, has been under-appropriated for many years. The account now accumulates about \$900 million annually, but appropriations from it have declined to under \$300 million annually. Of the total revenues accumulated in the fund for conservation purposes, Congress has spent less than half.<sup>7</sup> Much of this money goes to states and enlists the power of cooperative federalism to promote species conservation. Congress should view such spending as an investment, because it reduces future recovery costs and burdens on businesses.

Federal funding can be used to conserve habitat with methods other than land acquisition. Another long-employed conservation tool is the appropriation of subsidies to encourage and compensate landowners for better management to protect species. Indeed many landowners expect compensation for foregone profits resulting from habitat protection. The farm bill programs provide some of this aid but are typically limited to agricultural land and are not sharply focused on biodiversity. Funding of incentive programs for habitat protection and enhancement could yield tremendous conservation dividends without enlarging the Federal estate of public lands.

The ESA section 6 cooperative agreements to states and tribes could be significantly extended with infusions of funding. This would give greater control of priorities to states, which often feel pushed around by the priorities of Federal agencies. In addition, all states have produced comprehensive wildlife action plans to protect biodiversity. Avoiding new ESA listings is a foundational purpose of each of these state plans, which Congress encouraged through a grant program contingent on

<sup>3</sup>Robert Fischman, *Predictions and Prescriptions for the Endangered Species Act*, 34 Environmental L. 451 (2004).

<sup>4</sup>Vicky J. Meretsky et al., *A State-Based National Network for Effective Wildlife Conservation*, BioScience 62:970–976 (2012).

<sup>5</sup>David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, BioScience 48:607–615 (1998).

<sup>6</sup>Pub. L. No. 89–669, §§ 1–3, 80 Stat. 926, 926–27.

<sup>7</sup>Carol Hardy Vincent, *Land and Water Conservation Fund: Overview, Funding History, and Issues* (7–5700 RL33531) (2010).

Federal approval of the plans. Instead of supporting H.R. 4256's singular mandate that Federal agencies include states' counts of species in listing determinations, Congress should support the states' own wildlife action plans, which provide states with flexibility in setting priorities to avoid listings through programs of the states' own choosing. Federal grants to assist states in carrying out their plans amount to less than \$1 million/state/year and are decreasing over time. Funding the plans would require investments of \$9–26 million/state/year, a relatively small amount of money to head off much more expensive ESA challenges, where recovery costs are estimated to be many *billions* of dollars.<sup>8</sup>

While this committee does not directly control purse strings, it certainly can avoid making the situation worse. Requirements such as H.R. 4319's additional economic analyses and H.R. 4284's process involving "state protective actions" are problematic. Imposing new obligations on Federal agencies to engage in more analyses will exacerbate problems, as foreseeable appropriations are likely to be inadequate to carry out the necessary research. New obligations will also increase lawsuits and implementation by consent decree.

### III. CITIZEN SUITS PLAY AN IMPORTANT ROLE IN HOLDING AGENCIES ACCOUNTABLE TO THE REQUIREMENTS OF CONGRESS

One understandable reaction to the frustration of litigation against the listing agencies, especially over violations of statutory deadlines, is to outlaw the lawsuits or make them difficult to file. However, that would remove an important control over agency overreach. Citizen suits play an essential role in ESA implementation by keeping agencies focused on the commands of Congress and less distracted by the political demands of interest groups. As illustrated below, developers and other business groups actively employ the opportunity to hold the FWS to its legal mandates. Attorney's fees are generally available only to parties prevailing on the merits of lawsuits. That is a good incentive for citizens to bring to courts only meritorious claims of agency wrong-doing.

Courts defer to agency determinations under the "arbitrary and capricious" standard applicable to almost all ESA citizen suits. Therefore, plaintiffs can succeed on the merits only when the agency utterly fails to comply with the law. An agency decision must be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to [the constitution] . . . ; in excess of statutory jurisdiction, authority, or limitations . . . ; [or] without observance of procedure required by law . . ." in order for a court order a remand.<sup>9</sup> In other words, a mere disagreement or difference of opinion is not enough to overturn an agency action or trigger attorney's fees. In a commonly cited formulation, the Supreme Court stated that an agency action may be overturned under this standard if it:

has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>10</sup>

Establishing road-blocks to judicial review gives agencies license to consider factors unintended by Congress or to ignore considerations that Congress required to be part of a determination. For instance, the San Luis and Delta-Mendota Water Authority proved that the Federal listing of the Sacramento splittail as a threatened species was arbitrary and capricious. The court agreed with the water provider that the FWS failed to rely on the best scientific data available, to relate the data to the listing, and to provide a written justification to the state agency opposing the listing.<sup>11</sup> The citizen suit forced the agency to follow Congress' criteria in making a listing decision for the fish, which the FWS removed from the list of species protected under the ESA.<sup>12</sup>

Settlements through consent decrees allow the Federal Government to avoid unnecessary litigation expenses when the outcome is clear that an agency will lose. By mandating that each affected state and county approve a consent decree prior

<sup>8</sup>Vicky J. Meretsky et al., *A State-Based National Network for Effective Wildlife Conservation*, BioScience 62:970–976 (2012); Office of the Inspector General, U.S. Department of the Interior, Rep. No. 90–98, Audit Report: The Endangered Species Program 11 (1990).

<sup>9</sup>5 U.S.C. § 706.

<sup>10</sup>*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>11</sup>*San Luis & Delta-Mendota Water Auth. v. Badgley*, 136 F. Supp. 2d 1136 (E.D. Cal. 2000).

<sup>12</sup>Notice of Remanded Determination of Status for the Sacramento splittail (1Pogonichthys macrolepidotus), 68 Fed. Reg. 55,140–01 (Sept. 22, 2003).

to judicial approval, H.R. 1314 adopts a “tragedy of the anticommons”<sup>13</sup> approach that will stifle the number ESA-related consent decrees by giving too many parties veto power to hold out for better outcomes. Such strategies that make settlement more difficult will increase litigation costs at a time when Federal budgets are austere and will detract from the ability of agencies to effectively implement the ESA.

#### IV. CONCLUSION

The ESA works to prevent extinctions and employs sound science.<sup>14</sup> But that is not enough to ensure national conservation goals or minimize the costs of species protection. To accomplish those objectives, we desperately need legislation to create programs that would promote the ecological health of the Nation. The ESA is akin to a crowded hospital emergency room with a long wait. The most effective way of reforming the ESA is to provide treatments for species before their status is so dire. Programs like the state comprehensive wildlife action plans that head off more listings are a bargain compared to the emergency treatment under the ESA. Conservation success will require comprehensive legislative reform, more appropriations for the agencies charged with implementing the ESA, and vigilant citizens policing compliance with the act.

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The CHAIRMAN. Mr. Fischman, thank you very much for your testimony.

I now want to recognize Mr. Gary Frazer, the Assistant Director of Ecological Services for the U.S. Fish and Wildlife Service of the Department of the Interior here, in Washington, DC.

Mr. Frazer, you are recognized for 5 minutes.

#### **STATEMENT OF GARY FRAZER, ASSISTANT DIRECTOR FOR ECOLOGICAL SERVICES, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC**

Mr. FRAZER. Mr. Chairman and members of the committee, I am Gary Frazer, Assistant Director for Ecological Services of the U.S. Fish and Wildlife Service. I appreciate the opportunity to testify for you today regarding six bills to amend the Endangered Species Act. While the Department does not support the six bills as written, we welcome the opportunity to work with the committee on efforts to improve the implementation of the Endangered Species Act.

In the 40 years since it has passed, the ESA has prevented the extinction of hundreds of species, and promoted the recovery of many others. But as others have testified at earlier ESA hearings, increasing numbers of species are facing the threat of extinction; we need a strong and effective ESA now, more than ever.

The Service has creatively developed and used a variety of tools to engage landowners and other partners to advance the conservation of at-risk species. As an example, last month the Service announced its determination that listing the Montana population of Arctic grayling was not warranted. Private landowners in the Big Hole and Centennial valleys in Montana worked through a voluntary Candidate Conservation Agreement with Assurances, or CCAA, to improve conditions for grayling. Since 2006, over 250 conservation projects have been implemented under the CCAA. Habitat quality was improved, and grayling populations have more than doubled since the CCAA began.

<sup>13</sup> Michael Heller, *The Tragedy of the Anticommons*, 111 Harvard L. Rev. 621 (1998).

<sup>14</sup> National Research Council, *Science and the Endangered Species Act* (1995); Mark W. Schwartz, *The Performance of the Endangered Species Act*, Annual Review of Ecology, Evolution, and Systematics 39:279–299 (2008).

The collaboration between ranchers and the Federal and state resource agencies serves as a model for voluntary conservation across the country. These and other success stories across the country reflect the kind of innovation, collaboration, and flexibility that professional men and women of the Fish and Wildlife Service and our partners bring to the difficult job of species conservation under the ESA every day.

I would now like to briefly comment on the six bills before the committee.

H.R. 1314 would amend the ESA to give parties more opportunity to intervene in ESA lawsuits, effectively prohibit the payment of attorneys' fees to plaintiffs in any case it settles, and require each state and county within the range of the species to approve any settlement. If this bill were to be enacted, these provisions would make it highly unlikely that any plaintiff will agree to settle a case. Instead, plaintiffs would likely press the courts for summary judgment, seeking a remedy likely far less favorable for the Service, and forcing the government to incur litigation costs far in excess of the reasonable attorneys' fees associated with the settlement agreement. For that reason, the Department opposes H.R. 1314.

H.R. 1927 is aimed at minimizing the extent to which Californians' water supplies are impacted by requirements for fish listed under the Endangered Species Act. While drought is not referenced in the language of this bill, it is clear that any water supply impacts associated with the ESA are more conspicuous because of the drought's effects on water supplies this year in California. The central reason for reduced water supplies in California this year stems from drought, not the implementation of the ESA.

The Department does not support H.R. 1927, and our views are directly informed by the actions that are being taken to address the drought, actions promoting sound water management, consistent with existing laws, including the ESA, which lead us to the conclusion that these coordinated actions are better able than the measures described in the bill to provide the operational flexibility to best maximize the delivery of the limited water supplies available during dry years, while protecting endangered species.

H.R. 4256 would amend the ESA to direct the Secretary to count all individuals of the species without regard to land ownership or conservation status for the purpose of determining whether or not to list a species as threatened or endangered. The Department has concerns about H.R. 4256 as currently drafted, but would be happy to work with the committee to discuss how the objectives of the bill could be achieved without compromising the listing determination process set forth in the Act.

H.R. 4284 would amend the ESA to establish a process by which any population of a species in a state would be precluded from listing as a threatened or endangered species if the Secretary has approved a State Protective Action for the population. While we strongly support the intent of the bill to provide additional incentives for states to develop and implement conservation plans for candidate species, we have concerns with H.R. 4284 in its current form. We would be happy to work with the committee to further explore options that would engage states early in an effort to con-

serve species and their habitat before a listing under the ESA is required.

H.R. 4319 would amend Section 4(b)(2) of the Act to make it mandatory that the Secretary exclude any area from designation of critical habitat if she determines that the benefits of exclusion outweigh the benefits of inclusion. The Department opposes H.R. 4319 because, by making the exclusion process under Section 4(b)(2) mandatory, as opposed to discretionary, it will greatly increase the litigation exposure of the government for critical habitat designations.

And H.R. 4866 would reverse the Service's listing of the lesser prairie chicken as a threatened species. The Department strongly opposes H.R. 4866. The Service carried out its responsibilities and made a science-based listing determination in accordance with the Act. The final listing determination for the lesser prairie chicken as a threatened species came with a 4(d) rule that establishes that landowners and businesses enrolled and participating in the state's range-wide conservation plan are not subject to further regulation under the Act. A congressional override of this lawful and proper listing determination would severely undermine effective and science-based implementation of the Act.

In conclusion, America's rich and natural heritage of fish, wildlife, and plants belongs to all Americans, and ensuring the health of imperiled species is the shared responsibility of all of us. The Service has been responsive to the need to develop flexible, innovative mechanisms to engage the cooperation of private landowners and others, both to preclude the need to list species where possible, and to speed the recovery of those species that are listed.

Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.

[The prepared statement of Mr. Frazer follows:]

PREPARED STATEMENT OF GARY FRAZER, ASSISTANT DIRECTOR FOR ECOLOGICAL SERVICES, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

Chairman Hastings, Ranking Member DeFazio, and members of the committee, I am Gary Frazer, Assistant Director for the U.S. Fish and Wildlife Service's Ecological Services program within the Department of the Interior (Department). I appreciate the opportunity to testify before you today regarding six bills to amend the Endangered Species Act of 1973, as amended (ESA). While the Department does not support the six bills as written, we welcome the opportunity to work with the committee on efforts to improve the implementation of the Endangered Species Act.

#### OVERVIEW

In the 40 years since it was passed, the ESA has prevented the extinction of hundreds of species and promoted the recovery of many others, including gray wolves in the Northern Rocky Mountains and the Western Great Lakes. The first fish to be proposed for delisting due to recovery, the Oregon Chub, is native to rivers and streams in the State of Oregon. The recovery of the Oregon chub is noteworthy because it is attributable in significant part to the cooperation of private landowners who entered into voluntary conservation agreements to manage their lands in ways that would be helpful to this rare fish. In May 2013, the Service announced the first invertebrate to be recovered: the Magazine Mountain Shagreen, found in the Arkansas' Ozarks. This great conservation work has helped to achieve Congress' call to preserve the Nation's natural resource heritage, and it has happened alongside robust and sustained economic development.

But, as witnesses at previous ESA hearings testified, increasing numbers of species are facing the threat of extinction. The petition process, deadlines, and citizen suit provisions of the ESA provide appropriate opportunity for these parties to challenge the pace and priorities of the Service in administering our listing duties. This contributes to a seemingly unlimited workload with limited resources sometimes re-

sulting in missed statutory deadlines for which we are often sued. Settlement agreements are often in the public's best interest because we have no effective legal defense to most deadline cases, and because settlement agreements facilitate issue resolution as a more expeditious and less costly alternative to litigation.

When we settle a deadline case, we agree on a schedule for taking an action that is already required by the ESA. We do not give away our discretion to decide the substantive outcome of those actions, and the notice and comment and other public participation provisions of the ESA and the Administrative Procedure Act still apply.

The Multidistrict Litigation Settlement Agreement (MDL), likely the subject of H.R. 1314, has served to reduce deadline litigation by almost 96 percent. Through the agreement, the plaintiffs have agreed to substantially limit or eliminate their deadline litigation. This reduction has allowed the Service to use our objective, biologically based priority system to establish our work priorities, rather than have our priorities overridden by litigation seeking to advance plaintiffs' priorities.

Since the MDL settlement, the Service has used existing tools such as the Candidate Conservation Agreement with Assurances (CCAA) and others to engage landowners and other partners to advance the conservation of species. In fact, three proposals for listing have been withdrawn and more than 20 species, identified as candidates in 2010 and covered under the MDL settlement agreements, have been found to not warrant protections under the Act.

In October 2013, the Service withdrew its proposal to list the Coral Pink Sand Dunes tiger beetle, another species covered under the MDL settlement agreements that is found in Kanab, Utah. The Service was able to withdraw its proposal based on an amendment to an existing conservation agreement that sufficiently addressed the threats to the beetle by enlarging an existing conservation area, and targeting additional areas of habitat for protection. This was a joint effort among the Bureau of Land Management, Utah Department of Natural Resources, Kane County and FWS.

Last month, the Service announced its determination that listing the Montana population of Arctic grayling was not warranted. The grayling was another species covered under the MDL settlement agreements. Private landowners in the Big Hole and Centennial valleys in Montana worked through a voluntary CCAA to achieve significant conservation of grayling within its range. Since 2006, over 250 conservation projects have been implemented under the CCAA to conserve Arctic grayling and its habitat. Habitat quality has improved and grayling populations have more than doubled since the CCAA began in 2006. The cooperation between the Federal and state partners serves as a model for voluntary conservation across the country.

The Endangered Species Act provides great flexibility for landowners, states and counties to work with the Fish and Wildlife Service on voluntary agreements to protect habitat and conserve imperiled species. Through Safe Harbor Agreements, Candidate Conservation Agreements, Habitat Conservation Plans, Experimental Population authority, and the ability to modify the prohibitions on take of endangered species in Section 9 by crafting special rules for threatened species under Section 4(d), the Act allows and encourages creative, collaborative, voluntary practices that can align landowner objectives with conservation goals.

#### **H.R. 1314—To amend the Endangered Species Act of 1973 to establish a procedure for approval of certain settlements**

H.R. 1314 would amend the ESA to require the Service to publish all complaints received pursuant to the ESA within 30 days of being served in order to provide notice to all affected parties. Those affected parties would then have a reasonable period to move to intervene, during which time parties would be prohibited from moving for entry of a consent decree or to dismiss the case pursuant to a settlement agreement. The bill would create a rebuttable presumption that any affected party moving for intervention would not be adequately represented by the existing parties. If the court grants a motion to intervene, the bill requires the court to refer the case to mediation or a magistrate judge for settlement discussions including any intervenors. Finally, the bill revises the attorneys' fees provision, effectively prohibiting the payment of attorneys' fees to plaintiffs in any case that settles and adds a new provision that requires each state and county where the species at issue occurs to approve of the settlement.

The great majority of ESA litigation brought against the Service is to enforce compliance with the mandatory deadlines for action set forth under the Act. When the Service settles a deadline case, it is because we lack a viable defense, and we agree to a schedule for taking an action that is already required by the ESA on terms more favorable to the Government than what we might expect from a court if the case went to trial. We do not give away our discretion to decide the substantive out-

come of those actions, and the notice and comment and other public participation provisions of the ESA and the Administrative Procedure Act still apply to the process for making those decisions. In short, so long as the Act imposes mandatory deadlines for taking action that exceed the capability of the Service to meet within the resources we have available, it is important that we retain the ability to settle deadline litigation on favorable terms and reduced cost to the Government.

If this bill were to be enacted, the prohibition against the award of reasonable attorney fees and the requirement that each state and county within the range of the species must approve any settlement will make it highly unlikely that any plaintiff will agree to settle a case. Instead, plaintiffs would likely press the courts for summary judgment, seeking a remedy that may be far less favorable for the Service and forcing the Government to incur litigation costs far in excess of the reasonable attorney fees associated with a settlement agreement. When deadline cases have been litigated in the past, courts have frequently imposed very short deadlines. Therefore, removing the incentive for settlement is likely to accelerate the timing of listing determinations and other actions required by deadline, thereby reducing the opportunity for interested parties to participate in the decisionmaking process. In addition, the necessity of fully litigating each case would greatly increase the administrative burdens and costs borne by the Service and the courts, with no offsetting benefit.

The Department opposes H.R. 1314 because it will greatly diminish the opportunity to settle deadline lawsuits brought under the ESA, where it is usually in the interest of the Government and taxpayer to do so.

#### **H.R. 1927—More Water and Security for Californians Act**

The More Water and Security for Californians Act, H.R. 1927, is aimed at minimizing the extent to which California's water supplies are impacted by requirements for fish under the Endangered Species Act (ESA; 16 U.S.C. 1531 et seq.). The bill addresses operation of the State Water Project (SWP) and Central Valley Project (CVP), collectively referred to as the "Projects," and applies to biological opinions associated with the projects under the ESA. The bill states that all requirements of the ESA relating to operation of the projects are "deemed satisfied" if reasonable and prudent alternatives (RPAs) from the biological opinions are implemented, additional actions are implemented and as long as state requirements for water quality are met. The bill favors specific operational regimes described in the biological opinions, and is aimed at preventing any interpretation of the biological opinions that would curtail water exports via the state and Federal pumping plants in the southern end of the Sacramento-San Joaquin Bay-Delta.

The bill's other major provisions authorize a fish hatchery program for delta smelt; a habitat program that includes fish passage projects in and above the Bay-Delta; and the installation of a barrier within the delta aimed at protecting migrating Chinook salmon and other listed fish from influence of the export pumps. No new funding is authorized or appropriated by the bill. While drought is not referenced in the language of this bill, it is clear that any water supply impacts associated with the ESA are more conspicuous because of the drought's effects on water supplies this year in California. In this third year of drought, all uses of state and Federal project water—including the environment—are severely impacted. But while media coverage and editorializing might argue otherwise, the central reason for reduced water supplies in California this year stems from drought, not the implementation of the ESA. It is true that the implementation of the ESA necessarily entails some choices, and requires the dedication of water that in some cases cannot be recovered. But it is not clear that the language of H.R. 1927, if enacted, would meaningfully change the water supply allocations made by the projects in drought years like 2014.

The Department does not support H.R. 1927 because it would limit the scope of actions the agencies can take, consistent with the best available science, for operating the state and Federal projects in a way that is protective of endangered species. The bill sets an unfavorable precedent of layering a general congressional policy goal over the top of carefully crafted actions that were developed to comply with the law for the protection of listed fish while still allowing water deliveries to continue. In addition, a section of this bill conflicts with longstanding Reclamation law, specifically Section 8 of the Reclamation Act of 1902. The bill could further complicate project operations in years of drought since many of its provisions, such as the reverse-flow language in Section XX(b)(2), which would potentially interfere with actions necessitated by the specific hydrology of a given year. The Department's views on H.R. 1927 are directly informed by the actions that are being taken to address drought, actions promoting sound water management consistent with existing laws, including the ESA, which lead us to the conclusion that these coordi-

nated actions are better able than the measures described in the bill in providing the operational flexibility to maximize the delivery of the limited water supplies available during dry years.

We share the goals of the bill's sponsor to secure California's water supplies, but do not believe the approach embodied in H.R. 1927 advances that objective.

#### **H.R. 4256—Endangered Species Improvement Act of 2014**

The Endangered Species Improvement Act of 2014, H.R. 4256, would amend the ESA to direct the Secretary of the Interior, to count all of the species without regard to whether it is found on state, private, or tribal lands as determined by the state, for the purposes of whether or not to list a species as threatened or endangered.

For the purpose of determining whether a species should be listed as threatened or endangered, the Service must consider both the status of the species, for which population size is an important consideration, and the threats to that species using the factors set forth in the statute. The Service always counts all individuals for the purpose of estimating population size, but in some circumstances may not credit all individuals as contributing to a secure population that is not at risk of extinction.

The Department has concerns about H.R. 4256 as currently drafted but would be happy to work with the committee to discuss how the objectives of the bill can be achieved without compromising the listing determination process set forth in the Act.

#### **H.R. 4284—ESA Improvement Act of 2014**

The ESA Improvement Act of 2014, H.R. 4284, would amend the ESA to further engage states in the conservation of threatened and endangered species. The bill would establish a process by which any population of a species in a state would be precluded from listing as a threatened or endangered species listing if the Secretary has approved a State Protective Action (SPA) for that population.

The bill would require the Secretary to provide the state with at least 90 days advanced notice of a proposed listing rule together with "criteria for approval" of a SPA. Within 45 days of submission of a SPA, the Secretary would have to approve the plan if it meets the criteria. If it does not meet the criteria, the Secretary would provide written comment explaining the disapproval; provide 45 additional days for a resubmission; and make a final approval determination within 30 days thereafter. Upon final approval of a SPA, the Secretary would be precluded from listing the population(s) in the state(s) covered by an approved SPA.

The bill would require the Secretary to review SPAs every 5 years, and would give the Secretary the authority to revoke the approval if the state has failed to implement the Action or if the Action "has failed to make measurable progress toward achieving the recovery criteria for the population." The bill states that revocation of approval may not occur any sooner than 5 years after the approval. Once approval is revoked, the Secretary may propose adding the species to the list. The Secretary would also be empowered to "terminate" the Plan if the recovery criteria for the population have been achieved. The bill also states that SPAs would be treated as cooperative agreements for the purposes of Federal grants.

While we support the intent of the bill to provide additional incentives for states to develop and implement conservation plans for candidate species to avoid the need for listing under the ESA, but have concerns with H.R. 4284 in its current form. Most significant among our concerns is that: (1) it establishes a process to exclude all or part of a population from listing without opportunity for public comment on the criteria for approval of a plan and merits of the SPA submitted by the state(s) for approval, and (2) it precludes ESA protection for a covered population for at least 5 years even if a state fails to implement an approved SPA.

However, the Department strongly supports the intent of the bill to encourage states to proactively develop and implement conservation actions for candidate and at risk species so that protection under the ESA is not necessary. To this end, we would like to work with the committee to further explore options that would engage states early in an effort to conserve species and their habitat before a listing under the ESA is required.

#### **H.R. 4319—Common Sense in Species Protection Act of 2014**

The Common Sense in Species Protection Act of 2014, H.R. 4319, would amend section 4(b)(2) of the ESA to make it mandatory that the Secretary exclude any area from the designation of critical habitat if she determines that the benefits of exclusion outweigh the benefits of inclusion. The bill would also establish, in statute, the requirement to publish a draft economic analysis at the time of a critical habitat proposal. We note that the Services issued a final rule on August 28, 2013 (78 FR 53058) that requires draft economic analyses to be issued concurrently with the proposed rule to designate critical habitat and codifies the practice of evaluating the

incremental economic effects that are solely the result of the designation of critical habitat.

In general, the Service agrees that areas should be excluded when the benefits of exclusion outweigh the benefits of inclusion, and we give careful consideration to the appropriate use of this discretionary authority when we designate critical habitat. However, the requirement that exclusions be mandatory, as opposed to discretionary, actions will greatly increase the litigation risks for critical habitat designations and will likely result in a greatly increased amount of litigation challenging the Secretary's decisions on whether to exclude areas from a designation. It is often not possible to fully quantify the benefits of either exclusion or inclusion and the Service must use judgment, informed by many years of experience in making critical habitat determinations, as to whether the benefits of exclusion outweigh the benefits of inclusion or not. In the past when litigants have challenged the Secretary's decision to exclude an area under Section 4(b)(2), courts have consistently noted the discretion given to the Secretary under ESA and upheld the Secretary's decision.

The Department opposes H.R. 4319 because, by making the exclusion process under Section 4(b)(2) mandatory as opposed to discretionary, it will greatly increase the litigation exposure of the Government for critical habitat designations.

#### **H.R. 4866—Lesser Prairie Chicken Voluntary Recovery Act of 2014**

The Lesser Prairie Chicken Voluntary Recovery Act of 2014, H.R. 4866, would reverse the Department of the Interior's listing of the lesser prairie chicken as a threatened species under the ESA until January 31, 2020, and prevent listing of the species after that date unless it is determined that implementation of the Western Association of Fish and Wildlife Agencies' (WAFWA) Lesser Prairie-Chicken Range-Wide Conservation Plan has not achieved its conservation goals.

The Department strongly opposes H.R. 4866. The Service carried out its responsibilities and made a science-based listing determination in accordance with the Act. The final listing determination for the lesser prairie-chicken as a threatened species came with a 4(d) rule that establishes that landowners and businesses enrolled and participating in the Range-Wide Conservation Plan are not subject to further regulation under the Act. A congressional override of this lawful and proper listing determination would severely undermine effective, science-based implementation of the Act.

#### **CONCLUSION**

America's fish, wildlife, and plant resources belong to all Americans, and ensuring the health of imperiled species is a shared responsibility for all of us. The Service has been responsive to the need to develop flexible, innovative mechanisms to engage the cooperation of private landowners and others, both to preclude the need to list species where possible, and to speed the recovery of those species that are listed. The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery. Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.

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The CHAIRMAN. Thank you, Mr. Frazer, for your testimony.

Now, for purpose of introduction, I will recognize my colleague from Texas, Mr. Flores.

Mr. FLORES. Thank you, Mr. Chairman, for holding today's hearing. We all know the special interest groups have been overwhelming the Fish and Wildlife Service with requests to classify numerous species as endangered. In 2011, settlements between two environmental groups and FWS resulted in a work plan for the Interior Department to make determinations for hundreds of species listings.

These settlements appear to give more regard to accelerated deadlines, rather than to adequately allow for the deliberative collection of the best-available science and data and population information. The 2011 work plan was decided behind closed doors, and without the input of states, counties, or other affected parties.

These special interest groups have been exploiting the agency's duty to meet certain deadlines to respond to these requests, and they follow up with lawsuits against the agency when it fails to meet its statutory review deadlines. These same groups are then able to recover the legal fees, only to take those taxpayer funds and to start the process all over again. In fact, they have filed or have been a party to over 400 lawsuits since the 2011 mega-settlements.

H.R. 1314 will give states and localities a voice in the settlements that impact them, and save precious taxpayer dollars by putting an end to the broken sue-and-settle process. Listing decisions resulting from these settlements impact all sectors of our economy—agriculture, energy development, and water resources, to name a few—all of which thereby further the economic endangerment of hard-working American families all across our country.

It is my pleasure, in connection with today's hearing, to introduce Tom Ray from Waco, Texas. Mr. Ray is the Water Resources Program Manager with Hicks-Ray Associates, and is testifying on behalf of the Texas Water Conservation Association and the Western Coalition of Arid States. Mr. Ray has over three decades of experience on water resource issues in the State of Texas, and it is my pleasure to welcome him to testify before this committee.

Thank you again, and we look forward to your testimony.

The CHAIRMAN. Mr. Ray, you are recognized for 5 minutes. And turn on the microphone, if you would.

**STATEMENT OF TOM RAY, WATER RESOURCES PROGRAM MANAGER, HICKS-RAY ASSOCIATES; TEXAS WATER CONSERVATION ASSOCIATION; AND THE WESTERN COALITION OF ARID STATES (WESTCAS), WACO, TEXAS**

Mr. RAY. Thank you, Mr. Chairman, members of the committee, Congressman Flores. It is a pleasure to be here and have this opportunity to testify on behalf of the Western Coalition of Arid States, WESTCAS, and the Texas Water Conservation Association, TWCA. Both of these groups appreciate the opportunity to present testimony in support of Congressman Flores' H.R. 1314.

WESTCAS is a coalition of mostly highly trained water and wastewater professionals from districts and cities throughout the arid West states. That includes Arizona, California, Colorado, Nevada, New Mexico, and Texas. TWCA is the leading organization in Texas that is dedicated to conserving, developing, protecting, and using the water resources of the state, all for beneficial purposes.

Pertinent to this hearing, both WESTCAS and TWCA support cooperation on two critical goals: protection of threatened and endangered species, and responsible and timely development and conservation of our water resources. There is no doubt that attempting to reach these goals can and does result in conflict. Members of both of these associations would assert that conflict results in delay. And, in both cases, delays can be detrimental and even destructive.

Recognizing this, we support the changes to the ESA settlement procedures that will provide an opportunity for stakeholders to be informed on pending ESA complaints and opt to be at the table.

Let me summarize my concerns with the present citizen lawsuit procedures. In 2011 there was the mega-settlement that was reached with the U.S. Fish and Wildlife, again, due to a statutory deadline failure. The settlement requires Fish and Wildlife to issue endangered or threatened rulings on 757 species by 2018. That goal is being achieved in an accelerated fashion.

However, the settlement that initiated that process took place out of the public arena with little or no input or involvement from potential affected parties. The result is that while local stakeholders were left out of that process, they were and still face the responsibility of responding to the proposed listings that could have potential harm to their communities and their economies.

In two ways, H.R. 1314 seeks to address this situation without limiting Fish and Wildlife's regulatory authority or preventing it from litigating a case to resolution. First would require the Secretary to publish notice of complaints within 30 days, and second, provide affected parties—what I am referring to as stakeholders—with a reasonable opportunity to intervene in a consent decree or settlement agreement that is filed pursuant to Section 11(g)(1)(C).

States, counties, and stakeholders can participate in the process. It also provides that, until the end of that intervention, parties to the suit may not motion for consent decree or dismiss the suit under a settlement agreement.

Another provision already mentioned is it would bar the practice of having the Federal Government pay the legal fees of plaintiffs in a settlement action.

In my written remarks, Mr. Chairman, I have cited a number of examples that I don't have the time to go into today, but I would cite quickly the dunes sagebrush lizard and the cooperative work that resulted in a comprehensive conservation plan, resulted in Fish and Wildlife Service in 2012 actually not listing the dunes sagebrush lizard. And I think it is an example of what can be done with cooperation.

Also, with that particular species, additional data was collected by one of the local stakeholders, by the energy group. They did find additional data that was not available when the listing was initially made.

In closing, in Texas and in the arid West, TWCA and WESTCAS are dedicated to pursuing sound scientific solutions managing our water resources and our water quality of those supplies in a responsible manner.

Members of the committee, I would suggest that if all parties and stakeholders, are notified through their respective local and state governments, and given the opportunity to present and participate in an ESA settlement discussion, there would be benefits, potentially overcoming the delays that can result from the outcomes of the present procedures.

Thank you very much, and again, we appreciate the opportunity on behalf of TWCA and WESTCAS to present this testimony.

[The prepared statement of Mr. Ray follows:]

PREPARED STATEMENT OF J. TOM RAY, PE, D.WRE, WATER RESOURCES PROGRAM MANAGER; TEXAS WATER CONSERVATION ASSOCIATION (FEDERAL AFFAIRS COMMITTEE CHAIR); AND WESTERN COALITION OF ARID STATES (FEDERAL LIAISON) ON H.R. 1314

Thank you for the opportunity to testify before you today on behalf of the West Coalition of Arid States (WESTCAS) and the Texas Water Conservation Association (TWCA). Both groups appreciate the opportunity to present testimony in support of H.R. 1314, which is legislation to establish a procedure for approval of certain settlements with regard to endangered species.

WESTCAS is a coalition of approximately 75 water and wastewater districts, cities, towns, and professional organizations focused on water quantity and water quality in the arid-West states of Arizona, California, Colorado, Nevada, New Mexico, and Texas. Its mission is to work with relevant Federal and state water quality and quantity agencies to promote scientifically sound laws, regulations, and policies that support adequate supplies of water in the arid West, recognizing the unique hydrologic and water resources conditions of the arid-West and in a manner that protects public health and the environment of the arid West.

TWCA is the leading organization in Texas developed to conserving, developing, protecting, and using water resources of the state for all beneficial purposes. The membership encompasses the full spectrum of water use or interests: groundwater users, irrigators, municipalities, river authorities, navigation and flood control districts, industrial users, drainage districts, utility districts, and general/environmental interests. Each of these categories is represented on the TWCA Board of Directors.

Specific to this hearing, both WESTCAS and TWCA support cooperation on two critical goals—protection of threatened and endangered species throughout the United States and responsible and timely development and conservation of our water resources. There is no doubt that attempting to reach these goals can and does result in conflict. Members of both associations would assert that conflict results in delay—and in both cases, the protection of a critical species and provision and conservation of adequate water resources, delays can be destructive. TWCA and WESTCAS members are leaders in water conservation, reclamation, and innovative means to preserve our available water supplies. Recognizing this, we support the changes to ESA settlement procedures that will provide an opportunity for such stakeholders to be at the table. Having worked in water resources management in Texas for over 35 years, I have seen the emerging recognition that goals of water supply development and management must be co-equally pursued with the protection and recognition of needs for all the other resources that constitute our environment.

Let me summarize my concerns. In 2011, a settlement was reached between the U.S. Fish and Wildlife Service and two environmental groups. This settlement was the result of lawsuits launched by the two environmental groups charging that the FWS had failed to meet certain statutory deadlines associated with the filing of petitions to list hundreds of species. The settlement requires FWS to issue endangered or threatened rulings on 757 species by 2018. This goal is being achieved through an accelerated work plan to make these complex decisions. The process used to reach these agreements took place out of the public arena behind closed doors, with little or no involvement with potential stakeholders. Yet the species identified for possible listing have the potential to impact the lives and job opportunities for millions of Americans.

The result is that FWS is obligated to make determinations for hundreds of species in just a few years. Given the complexities involved in determining whether a species is endangered or threatened, it is not surprising that the Service and its staff have literally been overwhelmed. This fact encourages additional lawsuits by plaintiffs encourage further settlements with regard to species protection. Additional legal action can result in delays in needed projects or economic progress and in actions to protect species.

These are examples of instances where the Fish and Wildlife Service settled with a plaintiff and decided the dates by which they would make determinations regarding designations for endangered and threatened species. This “closed door” aspect of the settlements, which H.R. 1314 seeks to address, has received so much attention from those in Congress and from local stakeholders. By engaging in closed door agreements with environmental groups the Fish and Wildlife Service ceded its own species priority setting process to outside parties agreeing to take their marching orders from work plans created by environmental groups which were then, in turn, approved by a Federal Judge. The result is that while local stakeholders were left out of the process they still faced the responsibility of defending against proposed

listings that have the potential to harm their communities. There are even cases where the Fish and Wildlife Service had already entered into conservation agreements with locals only to have the 2011 settlement upend the time frames for conservation or the study of a listed species.

H.R. 1314 seeks to address this confusion by establishing a procedure to approval settlements with regard to endangered species. The chief benefit would be to stop the practice of closed-door agreements that can lead to huge cost impacts despite the fact that important stakeholders such as state and local governments and businesses have been excluded from the discussion. This provides a path that will help avoid economic damages and job losses as well as help forestall overreach by both environmental groups and the Federal Government.

We support H.R. 1314's requirement that all complaints filed with regard to endangered and threatened species which provides that the Secretary must publish within 30 days all complaints filed against it. This involves wide dissemination of the complaint within the Federal community and among stakeholders at the state and county levels of government. It is impossible for stakeholders to become involved in a process which they may not even know exists. We also strongly support the provision in this legislation that prohibits the failure of the Secretary of the Interior to meet a deadline to be used as the basis for a designation. Failure to meet deadlines for determinations regarding hundreds of species should not be an excuse for designations that may not reflect the best available science and which may threaten serious local impacts.

In addition to requiring the Secretary to publish complaints filed in association with a species, H.R. 1314 also includes a path that allows states or counties to participate in the review process. The Secretary of the Interior must provide states and counties where the species that are the subject of the lawsuit occur are provided with notice of proposed covered settlements, and consult with the states to make sure it gives notice to the right counties. These provisions are an important of ensuring that local affected stakeholders play a meaningful role in the complete review and listing process.

Yet another provision of this legislation bars the practice of having the Federal Government pay the legal fees of the plaintiffs in a covered settlement. This will help end the practice of taxpayer dollars being used to subsidize suing the Federal Government. H.R. 1314 limits the use of taxpayer dollars in paying litigation costs in any proposed covered settlement to any party. This would prevent a repeat of the 2011 settlement where the two plaintiffs were awarded legal fees in addition to the settlement designating hundreds of species for potential listing and also an accelerated work plan to expedite the process.

The kind of severe land use restrictions that are often associated with an endangered or threatened designation can often play havoc with the local economies of local communities, states, or entire regions. This is the case throughout the arid West, which are only exacerbated by other conditions such as drought and population growth. This underscores the potential benefits of early notification of ESA.

There are important examples in Texas that support giving local government and stakeholders an input in settlements, as provided in H.R. 1314. This is the case with the Dunes Sagebrush Lizard (DSL). The listing of the DSL would have threatened energy exploration, and in consequence the entire regional economy of portions of west Texas and eastern New Mexico. The State Comptroller facilitated the development of a conservation plan by a group of stakeholders including private landowners, royalty owners, the oil and gas and agriculture industries, academia, and state and Federal agency representatives. In June 2012 FWS announced its decision not to list the Dunes Sagebrush Lizard as endangered due in large part to the conservation and the voluntary enrollment of landowners in the plan. However, another key factor was the effort of the oil and gas industry to obtain valid scientific data on the DSL in Texas; data that was unknown when the DSL was proposed for listing by FWS. The lessons learned with the DSL support the benefits of local and state government notification in ESA settlement procedures.

State of Texas has been impacted by the 2011 settlement that identified 22 species for possible designation as endangered or threatened. There has been a great deal of publicity with regard to 3 of these 22 species including the Lesser Prairie Chicken, and the Georgetown Salamander. Issues associated with protecting the Lesser Prairie Chicken include controls over drilling rigs and wind turbines, which are mainstays of the economy of west Texas and much of the five state area of the Prairie Chicken's habitat. Williamson County, just north of Austin, is one of the fastest growing areas of Texas. The water habitat needs of the Georgetown Salamander and the Jollyville Plateau Salamander, added in 2013, impacts the ability of local governments to issue the building permits and construct water treatment

facilities that might threaten this species. These restrictions will impact the local economy of the city of Georgetown and much of Williamson County and Austin area.

It was a surprise for the state and local governments and businesses to discover in mid-2011 that species had been identified for listing and that the protections being sought potentially involved steps that would undermine key areas of the economy including energy exploration, ranching, and construction. All of these communities would have benefited had they known these discussions were about to produce the settlement of 2011. The discussions on the three Texas species that have gone on for the past 3 years have triggered an exhaustive effort by the Texas Congressional Delegation, the State of Texas, numerous counties and local governments, and the energy and ranching communities, all directed toward listing agreements that all parties could live with.

In the end, the Lesser Prairie Chicken and the Georgetown Salamander were both listed as threatened. These designations were achieved only after extensive interaction among all parties that resulted in major habitat protection practices being adopted by the city of Georgetown, Texas regarding protecting the water sources of the Georgetown Salamander. Energy exploration and production companies and ranchers also agreed to new land use policies protecting the Sand Dune Lizard and the Lesser Prairie Chicken that should offer major new protections for both species. This progress could have been achieved in a much less chaotic and convoluted manner had the protections of H.R. 1314 been in place which would have notified the state and local stakeholders at the beginning of the negotiation phase that produced the settlement of 2011 as opposed to once the agreement had been made between the FWS and the environmental groups.

In Texas and the arid West, TWCA and WESTCAS are dedicated to pursuing sound, scientific solutions, managing our water supplies and our water quality of those supplies in a responsible manner. As a member of the committee, I would suggest that if all parties (stakeholders) are notified through their respective local governments and given the opportunity to be present and participate in the ESA Settlement discussions, there would be benefits potentially overcoming the delays that can result the outcomes of the present closed-door procedures.

Members of the committee, thank you again for this opportunity to testify regarding H.R. 1314 and the benefits it would bring to the ESA Settlement procedures.

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The CHAIRMAN. Thank you very much, Mr. Ray, for your testimony. I wanted to thank all the panelists for testimony. We will now start the questioning period for Members.

And I will just simply want to make an observation, that this is an issue, the Endangered Species Act and its implementation has been something that I have been interested in since I have been in Congress, and it is principally because the impact of the Endangered Species Act as to its implementation has principally been the West Coast, I am not saying exclusively, but principally in the West Coast.

And I cite the fact in my home state of Washington, when the spotted owl was listed some 20 years ago, the result of that listing, which was because of lack of old-growth—which, by the way, has since been acknowledged not the case; in fact, it is a predator, rather than the lack of old-growth—but the result of the critical habitat designation has resulted in timber harvesting in the Western part of the United States decreasing by 80 percent.

Now, you apply that to other things that you witnesses have touched on, of the economic impact you have in your respective states, it is serious. And that is why there is more of an interest, I think, across the country in bringing the Endangered Species Act up to speed. Keep in mind, it has not been reauthorized for 25 years. So, the interest of my colleagues from different parts of the country, I think, is healthy for the debate.

Now, this committee has had a series of hearings over the last 4 years. We have had hearings in Fresno, California, we have had

them in Longview, Washington, in my home state, in timber country. We had hearings in Billings, Montana, and Casper, Wyoming. And we had a hearing in Batesville, Arkansas earlier this year. And just yesterday we had a hearing in Harrisburg, Pennsylvania.

Especially those last two, if you went back 15 years and had a hearing on the Endangered Species Act in those localities, it probably would not have raised any level of interest. But because of the mega-listing that went on with the Obama administration that would potentially list 50 percent more potential listings than what has been listed in the first 40 years, it causes some concerns, and it causes, I think, a discussion on the law.

Now, Mr. Frazer, in your opening line you said you oppose all bills. At least your Department opposes all bills. And in your testimony you said you are willing to work with people on those bills. I have to tell you that is progress, albeit small progress. Because, in the past, we would have heard, "Absolutely not, forget it, we don't even want to talk about it." But the mere fact that we are talking about this in a rational way, and Members introducing pieces of legislation from other parts of the country to deal with this, is a step forward.

I would rather, Mr. Frazer—and I will say this—say that the most important part of your testimony is your willing to work with Congress in order to bring the Endangered Species Act up to speed. So I just wanted to make that statement. And you can certainly see, by the interest here on this committee, that, as this Congress winds down, that this is an important issue.

And I might add the bill that I alluded to in my opening statement passed on a bipartisan basis. And all it talked about—and I think every one of the witnesses here, in some way or the other, alluded to it—transparency. Why are we listing or delisting? Tell us why.

We are going to have another hearing tomorrow to find out why we haven't gotten that information from the Department of the Interior. It makes perfectly good sense to me. If these issues are so important, why don't the American people know why these things were done? Tell us why, and then we can argue about it. But right now it is done, and the mega-listing was done, frankly, behind closed doors.

So, this issue is not going to go away. I know it is not going to go away. But I do want to congratulate my colleagues for taking the initiative in their own respective ways of addressing this issue.

So, with that, I will yield back my time, and I will recognize Mr. Costa from California for his questioning.

Mr. COSTA. Thank you very much, Mr. Chairman, for this hearing, and for the subject matter on both panels.

Mr. Frazer, several different questions. I listened very carefully to your comments with regards to the legislation that I have introduced, H.R. 1927. How familiar are you with the operations of the Central Valley Project in California?

Mr. FRAZER. To be perfectly honest, Congressman, I am not well versed in the details. This is an extremely complex project, operation—

Mr. COSTA. No, it is a very complex project. You made some statements that obviously were the result of other people's input,

if you are not familiar with the knowledge. Because I was going to ask you when—to summarize your statement, and tell me if you think it is an unfair summary—is that the current law is working and the operational flexibility exists within the project, and there is no need to make the changes that are considered under the legislation I introduced, H.R. 1927. Would that be an accurate summary?

Mr. FRAZER. Well, I would phrase it in terms of we believe that the existing biological opinions and the flexibility that we have under the Act, and working with the state and other Federal agencies, is doing the best that we can to address the very challenging drought situation we are having in California.

Mr. COSTA. Yes, well—but there are numerous factors that are impacting the species. And, obviously, the drought is state-wide, and I will talk more about that later on.

But in March of this year we had pulse flows in which—are the times where you can move water around. That means you have rain and you have excessive water that is moving the salt water out to the ocean, and that gives you the ability to allow the Federal project to operate, and the State Water Project to operate.

And I am curious, but you may not be able to answer this, when you have those excessive flows occurring in March as a result of the storms, and even though there was no take on the delta smelt that were listed, and even though the take on the salmonoid and the steelhead was less than 10 percent of the allowable take, which, I would say, is de minimis; yet, there was no change in the ability to operate the projects to move water that could be moved as a result of losing as much as, it was estimated 150,000 to 200,000 acre-feet of water this March. And last year, if you apply the same criteria, as much as 800,000 acre-feet. I am just wondering how you think that everything is fine.

Mr. FRAZER. Well, I think, as you know, that there are multiple objectives for managing those projects, including—

Mr. COSTA. And multiple objectives is to protect the fish, the species. That is what this hearing is all about.

Mr. FRAZER. And since last—

Mr. COSTA. And if you have less than 10 percent being taken at the time that you are allowed to move water, to pump water, but you chose not to, then I am trying to understand the rationale, or the reasoning for that.

Mr. FRAZER. So since last fall, in this drought situation, the biological opinion for delta smelt has not constrained water operations of the project.

Mr. COSTA. Oh, that is not true. How do you make that statement?

Mr. FRAZER. There are many other objectives, water quality and other issues that are—

Mr. COSTA. Of course. And water quality during those pulse flows was—I mean that is the only time you could pump, because you had storms that took place in March, so you had excess water flowing through. So the other criterias were all being met, as well.

So, obviously, you are not familiar with how the projects operate, and you have read a statement, I understand that. I appreciate that.

Let me ask another question you might have more knowledge of. You state in your testimony that part of the Service faces significant challenges related to its mission to meet recovery of listed species, and that a significant amount of the challenge is a lack of resources. Did you say that?

Mr. FRAZER. I don't remember that being——

Mr. COSTA. Devoted to species recovery?

Mr. FRAZER. We certainly are challenged to address all our responsibilities——

Mr. COSTA. What percentage, or the average of the agency-requested funds for species protection have been provided by Congress, can you tell us?

Mr. FRAZER. It has been quite a few years since we have had an appropriations process that actually was able to result in anything other than a continuing resolution, so it is hard for me to answer that.

Mr. COSTA. Well, I mean, you could make that statement with everything. We have been operating on auto pilot for a long time around here.

Do you feel that during the reauthorization of the Endangered Species Act that there are improvements that can be made that would help recovery, much to the comments of the witness next to you, who talked about looking at species as a whole, I mean do you think it is, I mean we created this, and we have 20 years or more of experience. Has the Department attempted to come in, in terms of making assessments and what changes or improvements you would like to make?

Mr. FRAZER. The Department, the Fish and Wildlife Service, are constantly looking for opportunities to improve implementation. We think we have a significant administrative authority to make improvements, and we are doing so. But, as I said in my statement, that we are also very happy to work with Congress on how we might improve implementation of the Act.

Mr. COSTA. Well, I mean, we have sought efforts to get comments on a host of efforts, and it has been unsuccessful thus far.

I guess my time has passed, but thank you very much, Mr. Chairman. I look forward to the other witnesses.

The CHAIRMAN. I thank the gentleman. I now recognize the gentleman from Oklahoma, Mr. Mullin.

Mr. MULLIN. Thank you, Mr. Chairman. I would like to visit a little bit with Commissioner Staples.

You had made mention with the Fish and Wildlife that the finalized statement, including deadlines for hundreds of decisions regarding the listing of the habitat designation; did they ever consult you or talk with the state before they did this?

Mr. STAPLES. Oh, I think there is a big difference between actual consulting and then just letting you know that it is going to happen. And the level of participation has clearly not been there in order to lead to the propagation of the species that we think could be done under a process like the State Protective Action Plan that is being proposed by Congressman Neugebauer.

Mr. MULLIN. So they just came in and basically said, "Hey, we know how to run the land in Texas and take care of the animals there better than those that live there," is that correct?

Mr. STAPLES. It is clearly an adversarial relationship. We have had some success, but it has been a success at a tremendous cost that could be averted and lead to better management of the species.

And I would say, Congressman, that there is no better steward of a resource than someone who has a vested financial interest in that item. And, clearly, landowners have that and recognize that. And states are ready to lead.

Mr. MULLIN. We have a tremendous amount of pride in Oklahoma, especially in our football program—had to throw that out there—but, you know, what I don't understand is how people from Washington can come in and start essentially telling us that, hey, we don't care enough about our land.

And so, in your knowledge, are you aware of this ever happening before? I mean in the state history with the Fish and Wildlife just absolutely refusing to work with the state, that just says, "Hey, we're going to tell you how to do it, we're going to take it from here"?

Mr. STAPLES. Well, the lesser prairie chicken is a big example of that, where—

Mr. MULLIN. Yes, sir, it is.

Mr. STAPLES [continuing]. Where landowners came together, energy sector, agriculture, and said, "Look, we have a plan that will work," and that the Service was very complimentary of, and they chose to list it, anyway.

We also have examples of the recovery credit system that was initiated by the Texas Department of Agriculture, where we actually worked very cooperatively with Fish and Wildlife, with landowners, and with groups that, many times, have an adverse opinion on the way to get things done. But we came together and developed a recovery credit system to help develop habitat for the golden-cheeked warbler in the central Texas area around Fort Hood that has been very successful.

Our states worked together, and Oklahoma does a good job working with Texas in getting our football players. Adrian Peterson was from my home town, I might add to that.

[Laughter.]

Mr. STAPLES. Congressman, we still think about that—

Mr. MULLIN. Well, I appreciate you all getting him ready; we just finished him off.

You know, talking about the lesser prairie chicken, landowners and the industry came together and put in roughly 7 million acres and they voluntarily took control. They pumped in over \$42 million into it, from the landowners, private, and the industry. And the last reports, the lesser prairie chicken hatch was up 20 percent this year.

Now, if I remember correctly, Chairman had stated that the success rate so far has been somewhere around 2 percent with the Endangered Species. That just goes to show how, when states and landowners who care, who live in the area, when they come together and they see a need, how they can plug the hole and have better results.

Mr. STAPLES. And the example is that those five states do not always agree on issues, but they did come together, cooperatively, to present a solution that was viable.

We know that the analogy of the emergency room and doctor's office has been used by Congressman Neugebauer and Professor Fischman. I would submit to you that being in the emergency room for 40 years is not anything you want to claim success over.

Mr. MULLIN. Right.

Mr. STAPLES. People die by staying too long there without getting what they need. And we certainly need action here. And these are sensible reforms that can make a difference and bring the brightest minds working together cooperatively.

Mr. MULLIN. Well, thank you for bringing a common-sense approach, and thank you for Adrian Peterson, we really appreciate him up in Oklahoma. And I know we are all cheering him on now, right?

Mr. STAPLES. Absolutely.

Mr. MULLIN. Thank you.

Mr. STAPLES. Thank you.

Mr. MULLIN. And I yield back, sir.

The CHAIRMAN. I thank the gentleman for his statement. And I was going to make the remark, if Mr. Staples had not preempted me by suggesting that many of the Oklahoma football team players come from south of the Oklahoma border.

With that, I will now recognize the gentleman from California, Mr. Huffman.

Mr. HUFFMAN. Thanks, Mr. Chair. Apologies for the technical difficulties. And thanks to the witnesses for being here, and for your testimony.

Mr. Frazer, I wanted to pick up with you, and actually thank you for bringing an important note of reality regarding the operations of the Central Valley and state water projects in the Bay Delta of California to this discussion today. You are correctly informed that the environmental restrictions and the biological opinion have had minimal impacts on water supply deliveries. In fact, you are corroborated on just about every score in the statement that you made today.

The state and Federal water contractors have acknowledged that there has been only minimal effects on water deliveries over the past 6 months. The Director of the California Department of Water Resources, who has served under both Republican and Democratic administrations, has said the same thing. It is a matter of basic fact, and yet it does not square with the narrative of this hearing, which is all about positioning the Endangered Species Act as a scapegoat. So, I thank you for pointing out what you did point out.

We are going to consider a bill a little bit later this morning that would basically shred the best available science as embodied in biological opinion that has been affirmed by the National Academy of Sciences and, so far, affirmed against every legal challenge that we have seen thrown at it. In place of that protection we have a bill that would hard-wire for 7 months of the year negative flow in one of the largest rivers in California at the rate of at least 5,000 CFS flowing in the wrong direction.

To give you a little context, because this is also part of the context, along with your factual statements, sir, take a look at the Potomac River when you leave the capital; 5,000 CFS in the wrong direction is about twice as much flow as the Potomac currently has in the right direction. So think about that; 5,000 CFS is greater than the flow today in the Rio Grand, it is greater than the flow of just about every river in Oregon that I can find, and every river in California.

So, the factual context of this very political discussion of the Endangered Species Act that we are having today is very important to keep in mind.

With that, I would like to ask you about the legislation involving settlements. Is it fair to say, Mr. Frazer, that if this legislation were law, it would—well, I am going to ask you to describe how it would affect your ability to settle cases where, frankly, the Federal Government is going to lose, and what that does to costs and to the budget of your agency and your ability to carry out your Endangered Species Act responsibilities.

Mr. FRAZER. As we read the bill, it would remove any incentive for plaintiffs to settle a case. And most of the deadline cases in which we do enter into settlement agreements are, as you said, ones for which we have no defense. There is a hard statutory deadline, we failed to meet it for whatever purpose, we have no defense.

We almost always find it to be in the interest of the government, and ultimately in the interest of the taxpayer, to settle and minimize the cost of addressing that complaint. And, ultimately, all we are doing is committing to carry out a responsibility that the Act gives to us. We don't make any commitment with regard to our final decision, the merits of the decision. We just commit to carry out the process, as required by the Act.

Mr. HUFFMAN. All right, thank you very much.

Mr. Fischman, I would like to ask you the same question. Based on your expertise on the Endangered Species Act, how will this affect the ability—and we know that the Fish and Wildlife Service, for example, sometimes blows a deadline. Sometimes blows a deadline because Congress hasn't given it enough funding to actually do its job, and gets put in this impossible situation, and then gets sued for blowing the deadline.

What does a piece of legislation like this do? What are the broader ramifications for the agency's ability to stretch its dollars and do its job?

Mr. FISCHMAN. Well, I think to some extent it is like dealing with the problem of weight gain by buying a longer belt, and then deciding that the problem has been solved.

The combination of increased numbers of species becoming scarce and endangered, along with flat budgets, creates the problem of the listing agencies being unable to keep up with their responsibility under the Endangered Species Act. Shutting down lawsuits doesn't change that reality. And without dealing with both issues, both the funding side and with the problem of there not being any safety net until species get to the brink of extinction, without dealing with those two issues, shutting down lawsuits or altering the way conflict is managed, won't get to the fundamental problem.

Mr. HUFFMAN. Thanks very much.

The CHAIRMAN. The time of the gentleman has expired. I recognize the gentleman from Texas, Mr. Flores.

Mr. FLORES. Thank you, Mr. Chairman. And, by the way, the last time that Commissioner Staples' alma mater and my alma mater played a school in Oklahoma, the score was 41 to 13, with Texas A&M on top. So I think we are a little prouder of our football.

[Laughter.]

Mr. FLORES. I have a question for Mr. Ray, and I thank you for joining us today.

In a previous hearing in committee requests, the Fish and Wildlife Service Director has refused to provide any details regarding the Interior Department's 2011 mega-settlements with the Center for Biological Diversity and the WildEarth Guardians, including deadlines set for, literally, hundreds of new listings and habitat designations, and they were stating that Federal court rules prevent them from disclosing that information. This includes information on the negotiation of hundreds of thousands of dollars of attorneys' fees for just agreeing to these mega-settlements.

In your view, Mr. Ray, should information surrounding the negotiation of these settlements be made public? And is that what H.R. 1314 would accomplish?

Mr. RAY. Yes, Congressman. I think those types of information should be made public. I am an engineer by trade, but my background is also in developing regional systems, and working with stakeholders on projects, and dealing with different types of Federal permitting requirements. And consistently we see that if you have the information and you bring in the stakeholders, the folks locally present to be able to work on the problem cooperatively, we can find some solutions.

Now, the litigation issue and the incentive for litigation I understand. But litigation will not go away unless we have cooperation, and I think that cooperation begins with disclosure.

Mr. FLORES. My next question for you is based—the publicly available court records reveal that the Center for Biological Diversity, one of the litigants that was a party to that mega-settlement, has subsequently filed more than 87 lawsuits against the Federal Government and numerous new listing petitions, even after the 2011 settlements were filed. So this, of course, runs contrary to what Professor Fischman and Mr. Frazer were talking about, in terms of the efficiency in the process.

The Fish and Wildlife Service states that the settlements have helped them to prioritize their workload, yet they also recognize that they are spending significant resources to implement these settlements.

In your view—two things. One, is this good policy? And, number two, does it promote a deliberative, science-based ESA decision?

Mr. RAY. I think it rushes the process and puts a lot of burden on Fish and Wildlife to move through the process. And, you know, if you have 780—excuse me—757 species that have to have settlement—or have to have work plans completed by 2018, that is a huge burden on Fish and Wildlife and on that agency.

So, no, I don't think that it is good policy, if you will, to put that agency in that situation, and certainly to leave the locals out of that—

Mr. FLORES. And one last question, and this is in your opinion. Should a party that settles an ESA lawsuit with the Federal Government be entitled to taxpayer-funded attorneys' fees as the prevailing party?

Mr. RAY. No, Congressman. That, in my opinion, should not be the case. The Federal taxpayer should not be burdened with that.

Mr. FLORES. And, Commissioner Staples, can't let you get away. Was the State of Texas, to your knowledge, ever consulted before the Fish and Wildlife Service finalized the settlement, including the deadlines for hundreds of decisions regarding the listings and habitat designations?

Mr. STAPLES. Not to—no, sir.

Mr. FLORES. Are you aware of any steps the Fish and Wildlife Service has taken to notify your state or other states on the listing petitions received from litigious groups?

Mr. STAPLES. Not to the extent where we have participation in the procedures, no—

Mr. FLORES. OK, thank you, Commissioner Staples.

I have one final question, and I am running out of time, so, Mr. Frazer, I am going to ask you to supplementally respond to this. Your testimony appears to give great weight to the concern of potential plaintiffs in ESA lawsuits and potential settlements. These settlements and listing decisions, as a result, ultimately impact the states and counties. Why shouldn't they have a seat at the table when these settlements are made? That is the first question.

The second question, who represents the interest and the economic health of the hard-working American families who are adversely impacted by these decisions, by these murky inside deals that FWS has made with activist groups who value non-human species more dearly than individuals and families? I would ask you to supplementally respond. Thank you.

I yield back.

The CHAIRMAN. Does the gentleman want to respond?

Mr. FRAZER. I am sorry, Congressman, I thought you wanted me to respond for the record.

The CHAIRMAN. Well, if you—listen, that would be good for the record, but if you can just briefly orally respond, just very briefly, but since you offered to do it for the record, we would ask you to do that in a very timely manner.

Mr. FRAZER. Be happy to do that. So these sorts of lawsuits are mostly deadline lawsuits. And we simply commit to carry out the responsibilities that the Act requires of us.

The process for carrying out those responsibilities does always involve public notice and comment, work with local government, landowners, all those that would be affected by a listing. And so, all the public participation processes that are part of our listing determination process will still be carried out, and none of those are constrained in any way by the settlement agreements that we enter into for deadline lawsuits.

Mr. FLORES. But the settlements are still confidential.

The CHAIRMAN. I thank you. The committee looks forward to your written response in more detail in that regard.

I recognize the gentleman from Arizona, Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman. Professor Fischman, as you noted in your testimony, Congress' failure to adequately fund ESA work has hampered species recovery efforts. Do any of the bills before us today increase the chances of recovering threatened or endangered species? Question one.

And to follow up on that, is there a way to ensure better conservation outcomes, better species recovery and protection under ESA without any additional funding?

Mr. FISCHMAN. I can't say that any of the six bills the committee is considering today would as the bills, in their entirety, promote recovery. I think there are some good ideas in the bills that promote cooperation, and I think that we can all agree that a cooperative process is at least a less expensive way of addressing recovery needs.

A lot of the great recovery credit systems, area-wide planning systems that do a good job for species recovery are voluntary, but voluntary in the sense that they are negotiated in the shadow of a somewhat more draconian outcome if the parties don't agree. So, sometimes it is useful to have the drastic threats, if you will, of the Endangered Species Act in order to promote voluntary agreements.

There certainly is more that agencies could do, and that Congress could do without additional appropriations. But I do think there is a bit of a trade-off. There are costs to many of the recovery challenges for endangered species. And if Congress isn't appropriating funds for that, then who bears those costs? Well, it is usually states or private landowners.

I think that flexible area-wide plans such as the ones that are memorialized in 4(d) rules, like the one for the California coastal gnatcatcher in San Diego County, the one for the lesser prairie chicken, are a good approach. As I said in my oral testimony, I think that we would be better off having those kinds of plans before a species is listed when there is more flexibility. The larger the area, the larger the population, the more room there is for trade-offs.

There are other programs outside of the Endangered Species Act that could prevent species from declining to the brink of extinction that could be enhanced without great additional appropriations. The National Wildlife Refuge System, for instance, has as one of its major missions to preserve ecosystems of the United States. Absent monies for appropriating new habitat, there certainly is existing public land that could be dedicated to refuges to avoid future listings or provide habitat for—

Mr. GRIJALVA. I was going to—

Mr. FISCHMAN [continuing]. Existing species.

Mr. GRIJALVA. Professor, I was going to—let me go back to a point that you made a part of the answer. We have heard a lot today about state efforts and whether it is the credit process we heard about, that states know best through their commissioners, through their state land departments, how to best protect species and deal with its revival, if necessary.

Would a lot of these efforts—and I don't know at this point that you can quantify it; probably not—would a lot of these efforts have occurred? And you mentioned that, without this looming threat, for lack of a better word, of more drastic legal action regarding ESA and what those kinds of court decisions and/or administrative decisions would have ended up being, did it prod or was it just the goodness in the heart of those particular people to do it that way?

Mr. FISCHMAN. Well, it is certainly an incentive. And I think, historically, if you look at the major compromises, the major trade-off plans, whether it be in the Pacific Northwest for, like, successional habitat for the northern spotted owl, or in southern California for the California gnatcatcher, they occurred with the looming hammer of the Endangered Species Act that parties sought to be avoided.

At the same time, I think, for many species, recovery is impossible unless states are on board. So there is a need for compromise on both sides.

Mr. GRIJALVA. Regarding the litigation legislation, the limits, constitutionally, in terms of public access, the public's right to know, how does this litigation, in your mind, affect those things?

Mr. FISCHMAN. I don't understand your question. I don't have an opinion on the constitutionality of those aspects of the bill.

I would say, as a researcher and scholar, I am in favor of more transparency. I would like to know more about settlements. I would like to know more about the costs. I think that my concern is that a sunshine law could get turned into a shut-down law if it results in making settlements more burdensome. That is going to create a lot of problems, in terms of expenses for the United States, and in terms of providing the resources necessary—

Mr. GRIJALVA. OK—

Mr. FISCHMAN [continuing]. To litigate cases—

Mr. GRIJALVA. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman. The Chair recognizes the gentleman from Michigan, Dr. Benishek.

Dr. BENISHEK. Thank you, Mr. Chairman. Thank you for being here, everyone.

I am looking at some of the stuff that is going on here in this Endangered Species Act, and some of the reforms here, and I am just going to relate one of the things that occurs.

Apparently, the Fish and Wildlife Service will only count species on Federal lands for the purpose of ESA listing, but when a species is proposed for a listing, both private and public lands will often be set aside for the species. And, apparently, in Utah, prairie dogs are overrunning many private landowners, but the Fish and Wildlife Service doesn't count those, it only counts those on Federal lands for recovery purposes. And one rural electric co-op had to spend \$150,000 to airlift poles around Federal lands because of the endangered prairie dogs, despite private landowners in neighboring areas being able to obtain permits to kill them because of their high numbers.

Mr. Staples, how does that make any sense to you?

Mr. STAPLES. Well, Congressman, it doesn't make sense. And that is the difficulty that we find ourselves in.

For another example along the lines that you gave, the dunes sagebrush lizard, private groups came together and did find addi-

tional habitat that was not included. So there is just too low of a scientific threshold if those are the criteria that are being met, and if our goal really is to propagate the recovery of the species.

Dr. BENISHEK. Right. Mr. Frazer, how does that make any sense to you?

Mr. FRAZER. Congressman, that really isn't an accurate representation of the situation. We count all the prairie dogs that are out there. In terms of knowing the status of the——

Dr. BENISHEK. Well, they didn't have to spend \$150,000 to airlift, and they are not killing the prairie dogs in the adjacent areas? Are you telling me that is incorrect?

Mr. FRAZER. I have never heard of that.

Dr. BENISHEK. OK.

Mr. FRAZER. So I can't speak to that. I can say that the prairie dogs that we count toward recovery are those that are secured in some sort of conservation status.

Dr. BENISHEK. All right. Well, let me ask another question here. About this prairie chicken, and these five states that entered into a cooperative agreement, and apparently the Fish and Wildlife Service was all in favor of this prairie chicken plan that these five states put together, and they worked with them. And yet, all the sudden, they changed their opinion, apparently, and still listed it as a threatened species.

Why would a state or a community ever work with you again, Mr. Frazer?

Mr. FRAZER. The five states, which are the range of the lesser prairie chicken, really did a landmark effort in working together to develop range-wide conservation——

Dr. BENISHEK. And you did laud that plan, right?

Mr. FRAZER. We lauded that——

Dr. BENISHEK. Why didn't you go along with the plan?

Mr. FRAZER. Because our job is to determine whether a species is threatened or endangered. And the population was crashing.

Dr. BENISHEK. Well, you know——

Mr. FRAZER. It declined by 50 percent from the previous year——

Dr. BENISHEK. Let me just interrupt you. It is pretty clear to me that your reason in your opening statement that you oppose Mr. Mullin's bill is because it would overturn a decision that you made in the Fish and Wildlife Service. That is not a very good reason, to me. I just don't like that idea. If you would have mentioned perhaps that you think the prairie chicken population was crashing despite this plan, but I don't see any incentive for people to work with you. And I know you are fostering an adversarial relationship.

Mr. Veach, do you have any opinion about that, this adversarial relationship that seems to be developing between the Fish and Wildlife Service and individual states and Farm Bureau people?

Mr. VEACH. Yes, I think so. I think that they actually——Director Ashe came to Arkansas, and we met with Director Ashe, and had an opportunity to talk about some of the issues that we were facing, and our concerns about how that affected agriculture, and not only agriculture, but our counties and our roads and bridges and all in those counties.

But I think that there is not enough communication, there are too many things that are ambiguous, that have the opportunity to

spread that critical habitat all over the place, and indiscriminately. And when that happens, then it affects people's lives and livelihoods. But that is the issue that we've got, and we've got to find that down a little lower——

Dr. BENISHEK. That touches on what Mr. Flores was talking about before, and that is—as I understand it, the Fish and Wildlife Service are supposed to take into account the economic impact of the things that they do, as far as, you know, putting this land into trusted areas. Do you think that they adequately assess the economic input of their decisions, as far as you are concerned?

Mr. VEACH. Absolutely not. And the reason is that they are not looking at all stakeholders. They are not looking at the situation that, if you have to apply for permits, it takes that length of time. If you are dealing with livestock or row crops, you don't have that time to do those kind of things. And if we don't continue to operate, and the best caretakers of the land and the environment and the species there are those that own that and make their living from it, from the land.

But we are being burdened down so much, and there are so many things that could happen to us. And one of the biggest risks is third-party litigation, also. Someone drives by and sees something going on in critical habitat by a farmer or rancher, and then they sue that farmer or rancher. And that has happened and cost them their livelihood.

Dr. BENISHEK. Thank you for your time.

The CHAIRMAN. Thank the gentleman.

Dr. BENISHEK. Thank you, Mr. Chairman.

The CHAIRMAN. The Chair recognizes the gentleman from the Northern Marianas, Mr. Sablan.

Mr. SABLAN. Thank you very much, Mr. Chairman, and good morning, everyone. I am going to use 4 minutes of my time and then yield the remaining time to Mr. Costa.

But I am just—I apologize for being late. I was actually in the office watching the news from back home, where two state agencies, or two local agencies, were having a dispute in public. One of them, a sub-grantee of Fish and Wildlife, the other one a sub-grantee of NOAA, having a public dispute about how to get their act together in pursuing the same thing. And so, I would like to ask this question to Mr. Frazer, if I may.

Mr. Frazer, H.R. 4284 gives states more responsibility for protecting threatened and endangered species, even though those species have become imperiled. I understand on the states that—how does that make sense in one way—in fact, like I just said, back home I have two government agencies trying to do the same thing, disagreeing on how to get the thing—and so how does that make sense?

And are there ways in which we could improve state involvement in species conservation?

Mr. FRAZER. Thank you, Congressman. We really don't see the conflicts between the Fish and Wildlife Service and our State Fish and Wildlife agencies. We are both challenged with a very large and complex job, doing our best——

Mr. SABLAN. Yes, and generally states—I am talking about H.R. 4284.

Mr. FRAZER. Right.

Mr. SABLAN. What—yes.

Mr. FRAZER. So we strongly support the intent of this bill, as we read, to encourage states to engage earlier and more effectively in conservation of species that are in trouble, so we don't need to address whether they need to be listed under the Endangered Species Act.

Mr. SABLAN. OK, but—and we have also repeatedly heard witnesses testify that there are a number of ways all stakeholders can participate in species conservation that is compatible with development. And, obviously, we all need development and support it too, but some say that they are cut out of the process.

Could you, Mr. Frazer, please describe the ways in which the ESA requires public comment and invites stakeholder participation before and after listing determinations are made, even when there is a lawsuit or settlement?

Mr. FRAZER. When we are petitioned to list a species, we determine that the petition has merit, then we ask for all information to help us determine whether the action may be warranted. If it is warranted, then we undertake a rulemaking process to determine whether to add a species to the list. And that has public notice and comment, as well.

Mr. SABLAN. And that is even when there is a lawsuit or a settlement?

Mr. FRAZER. Absolutely.

Mr. SABLAN. All right. I yield the remainder of my time to Mr. Costa, if I may, Mr. Chairman.

Mr. COSTA. I thank the gentleman from Northern Marianas, Mr. Sablan, for yielding me the balance of his time.

First of all, I would like to submit a list of resolutions from counties of Fresno, Tulare, Kings, Madera, Merced, and others that believe that modification needs to be made in the Endangered Species Act specifically related to my legislation on the basis of the devastating drought that is taking place. The Tulare School District, a comment from multiple cities that have been largely impacted.

Mendota Mayor Silva, Robert Silva, said that food lines have started in his city of 10,000, and the jobless rate will hit 50 percent, largely among Latino farm workers. If we could submit this for the record, Mr. Chairman, I would appreciate that very much, and so would multiple cities and counties and school districts that are being devastated by this drought.

Professor Fischman, you indicated in your testimony that part of the problem in looking at the Endangered Species Act that, too often, when it comes to the attention of trying to focus on a species, that their population is already crashing.

How do you make the tough scientific calls that undoubtedly we will have to make as the pressure of further urbanization takes place, and climate change, and which I have read a number of very noted scientists, biologists, indicating with temperature change, for example, in streams and rivers, that it may be impossible—and we know the climate is changing and it will continue to change, it always has—to maintain certain water temperatures, to maintain certain species. How do you make those tough calls?

Mr. FISCHMAN. Well, thankfully, I don't have to make those tough calls, Mr. Frazer does. But I guess I would have two different points to make to the two different questions, the first having to do with residential, commercial, and industrial development.

I think the best way to accommodate that development, as well as ecological resilience—oh, OK. The best way to accommodate both is to accommodate them early, when there is room, geographically, and in terms of the—

Mr. COSTA. But you can't change the temperatures of the water.

Mr. FISCHMAN. Right. And as to your second question, it is true that climate change will complicate these issues in ways that we still do not grasp and understand. And it may very well be that some of the species on the list are conservation-dependent species, in the sense that we can't reasonably expect to move them off the list in the foreseeable future. And then Congress will face the difficult choice of deciding to what extent we want to continue—

Mr. MULLIN [presiding]. The gentleman's time has expired.

Mr. FISCHMAN [continuing]. To fund those efforts.

Mr. MULLIN. The congresswoman, Mrs. Lummis, is recognized for 5 minutes.

Mrs. LUMMIS. Thank you, Mr. Chairman. And I too want to thank the panel for being here today. We really appreciate your testimony.

We have seen a growing number of bills while I have been here in Congress to amend and reform the Endangered Species Act. And I think that is an indication that it is not working well any more, and it is in need of reforms.

I also would like to say, Mr. Frazer, that I can't overstate how injurious the mega-settlement was to the implementation of the Endangered Species Act. Up until the mega-settlement, we didn't see as much acrimony in the country about the Endangered Species Act as we have seen since the mega-settlement. And there seems to be a rigid adherence by the Service to the mega-settlement deadlines, on one hand, but then, with regard to other deadlines that are statutory, the Department seems to let them slip. And let me give you an example.

Under the deadline provisions of Section 4 of the Endangered Species Act, wasn't the Service required to make a decision on the gray wolf listing by June of 2014?

And let me give you the background here. The Service proposed a national delisting in June of 2013. Now, 1 year after issuing a proposal to delist, the Service is required to publish in the Federal Register one of the following: a final delisting rule; or a withdrawal of the rule; or, if the Secretary finds substantial disagreement over data, a 6-month extension for purposes of gathering more data.

None of those has happened. And, yet, the deadline has slipped. Can you explain why that has happened?

Mr. FRAZER. Well, two points. Under our settlement agreement, what we committed to is to take actions that meet the statutory deadlines for acting on petitions and making listing determinations.

With regard to the gray wolf, you are absolutely correct that the statute also directs that we make final a rule that we have proposed or withdraw that within 1 year. We have not met that time

line. Because of the controversy and complexity of this rulemaking we have over 1.6 million comments that we also have an obligation under the Administrative Procedure Act to address and respond to in any final determination we make. So we simply have been overwhelmed with the volume of public comments, and have not been able to meet that deadline.

Mrs. LUMMIS. This is now 11 years after the gray wolf met objective, and coming on 20 years since the wolf was introduced into Yellowstone. It was introduced in January of 1995.

Mr. FRAZER. So we have delisted wolves in the Northern Rockies. We have delisted wolves in the Western Great Lakes. This has to do with the proposal to delist the remaining entity. And we published that proposal about 15 months ago, and so we have missed the 12-month deadline for making final—

Mrs. LUMMIS. You have, indeed. And so, my question is, why implement rigidly the deadlines in the mega-settlement, while letting an important deadline, an important deadline to the American people, like this one slip?

And I hear you say you have had a lot of comments. But it is not like those comments are a change or a new addition to 20 years of history with regard to the wolf.

Mr. FRAZER. Well, we certainly carry out our responsibilities to satisfy all our statutory deadlines equally. We don't choose one over the other. Some—

Mrs. LUMMIS. Well, it does seem like—

Mr. FRAZER [continuing]. Are more challenging to do—

Mrs. LUMMIS. It does seem like you are.

Mr. FRAZER. So, 1.6 million comments, even a very small percentage of 1.6 million comments having the substantive issues that we have to address is a lot of comments, and we simply do not have the resources to be able to do all that in a defensible fashion—

Mrs. LUMMIS. OK, so is that the reason that so much of what happened in the mega-settlement is still non-disclosed?

How can you justify doing a mega-settlement, rigidly adhering to the criteria and deadlines in the mega-settlement, while ignoring other deadlines?

Mr. FRAZER. Congresswoman, I don't think that we ignore any deadlines. The records associated with the negotiations for the settlement agreement were subject to a confidentiality agreement of the local rules of the court.

Mrs. LUMMIS. Confidentiality with regard to public policy.

I yield back.

Mr. MULLIN. Mr. Lowenthal is recognized for 5 minutes.

Dr. LOWENTHAL. Thank you, Mr. Chairman, and thank you, panel, for coming here to testify before us today. Unfortunately, my opinion, this hearing appears only to be focused on weakening the Endangered Species Act. We are considering six different bills today, and six different ways to weaken the Endangered Species Act. I could go into the details of each bill, but suffice to say that none of the bills will help save unique species from being wiped off the face of the earth forever. Instead, they are going to make it harder for endangered animals and plants to recover from the brink of extinction.

So, I am disappointed, although not surprised. This has been the theme of the Majority since they took control of this House and the committee. In this Congress alone we have already held four hearings that looked at other ways to weaken the Endangered Species Act.

What I want to briefly say is how important it is for all of us to be responsible stewards of our natural world, and how important the Endangered Species Act is to preserving the natural treasures we have for now and for future generations to enjoy.

When species are gone, they are gone forever. You cannot bring them back; they are gone from the planet earth. Some of the species that our forefathers walked the fields and forests with we do not now have with us today. And some of the birds that sing today and the plants we marvel at today our children will not know, if we let these species become extinct.

This is not a theoretical experiment; many animals have been driven to extinction by humans. For example, the Carolina parakeet, the eastern elk, the blue pike. The list goes on and on.

Eight days ago, September 1, was the 100th anniversary of the death of the very last passenger pigeon, once one of the most abundant birds in all of North America. There were once so many passenger pigeons that the sky would turn gray as flocks of millions flew overhead. But the population went from over five billion to zero in less than a century, as the birds were hunted to extinction. There are now no passenger pigeons, none. You and I and no one in this room will ever see the great migrations of the passenger pigeon. The only way we are going to see a passenger pigeon is when it is stuffed and on display in the Smithsonian Museum.

I want my grandchildren to have the opportunity to see the amazing mating display of the prairie chicken. I want my grandchildren to see salmon jumping out of the waters of the Pacific on the way back from their epic journey. And I want my grandchildren to have the opportunity to be awed by the graceful 8-foot wingspan of the iconic whooping crane flying overhead. I will support our rich American natural heritage by supporting a strong Endangered Species Act.

Thank you, and I yield back the balance of my time.

Mr. MULLIN. Thank you. Mr. Crawford is now recognized for 5 minutes.

Mr. CRAWFORD. I thank the Chairman. I also want my grandchildren—so I agree with you, I want my grandchildren. Don't have any yet. I am afraid that we are not doing a very good job to make sure that our own species is protected, but that is a debate for another time.

Mr. Veach, can you offer an example to this committee of where the proposed designation of critical habitat and the economic impact could be out of balance, and any other implications you would like to offer in your observations?

Mr. VEACH. Well, I think the most blatant example would be the dusky gopher frog, the critical habitat designation of the dusky gopher frog that is on 1,500 acres of private land in St. Tammany Parish, Louisiana. It is currently unoccupied, unsuitable, and inaccessible to that species. And in the words of the agency, "The designated non-habitat"—as they designated, non-habitat is critical

habitat, subject to the pervasive Federal regulation. By the agency's own estimation, restrictions on the use of property could cost the landowners as much as \$34 million.

This is hard to imagine, a more irrational decision than this critical habitat in that area of that 1,500 acres of land. But I think that the vast critical habitat that is being considered and still under public comment at this time, also in the State of Arkansas, as I alluded to in my testimony, with 31 counties and all that it affects in the State of Arkansas, is also overreaching of the critical habitat.

Mr. CRAWFORD. Thank you. Real quick, Mr. Frazer, does Fish and Wildlife have the expertise to propagate certain species?

Mr. FRAZER. Yes, we do.

Mr. CRAWFORD. Would you rather do that, or would you rather acquire more land?

Mr. FRAZER. We use all the tools that are appropriate for trying to recover and conserve species. In some cases, captive propagation is important. In some cases we only have a very limited amount of habitat available right now, and we need to have animals in refugium.

But, ultimately, what we are trying to do is conserve and recover species in their natural habitats.

Mr. CRAWFORD. To your knowledge, has Fish and Wildlife ever ordered a Fish and Wildlife biologist to stop propagating a certain species that may have been on a endangered species list?

Mr. FRAZER. Not to my knowledge.

Mr. CRAWFORD. OK, I am just curious.

Mr. Veach, Mr. Frazer, in his testimony, he stated that Fish and Wildlife Service "agrees areas should be excluded when the benefits of the exclusion outweigh the benefits of including habitat," yet he opposes H.R. 4319 requirements for mandatory consideration of both.

Currently, do you believe Fish and Wildlife adequately and fairly quantifies economic costs meaningfully be excluded?

Mr. VEACH. No, they do not. You know, we have to make an economic study that would consider all stakeholders and those it involved in this critical habitat designation. And not only do we have to do that, but we have to actually really consider those costs. I mean we have to weigh those against what we are trying to accomplish. And so I think that both of those are not being done. But that cost is certainly not being determined, of what that critical habitat designation would be.

And in addition to that—and which your bill does, Congressman—is it asks for that public comment, and then listens to that public comment, and weighs those. And we are doing so—and consider these costs to all stakeholders in that critical habitat designation.

Mr. CRAWFORD. OK. Mr. Frazer, real quick, have you been to Arkansas?

Mr. FRAZER. I have, sir.

Mr. CRAWFORD. You have? So you have viewed the proposed critical habitat area, and—

Mr. FRAZER. I am familiar with that part of the state, yes.

Mr. CRAWFORD. OK. Mr. Veach, last May the Obama administration proposed three new regulations that would significantly alter the definition of how they impose critical habitat designations. Some were concerned that these rules, which could be finalized as early as next month, would make it more difficult for areas to be excluded from habitat designations. Are you concerned with Fish and Wildlife Service and National Marine Fisheries Services proposed critical habitat changes?

Mr. VEACH. Yes, I am. One of those would actually change the adverse modification to include harassment of species. So you can imagine how broad that critical habitat could become, if we are also including not only what is inhabited by the Endangered Species, but that critical habitat that one day they could move into, and then also even harassment of the species. And this continues to grow and grow and grow, and then that regulatory burden up on farmers and ranchers, and not only them, but our counties as well in roads and bridges and things like that, is going to continue to increase.

Also it does not require species to exist or ever have existed in a location for critical habitat to be designated, and that is part of that, with the dusky gopher frog that I have mentioned, in Louisiana, and that continued to do that.

But also it is all pretty ambiguous. And it gives the latitude to do whatever they want to do about that critical habitat. And I think we cannot leave that wide open like that, we cannot.

Mr. CRAWFORD. Thank you. Thank you. My time has expired.

Mr. MULLIN. Thank you. I would like to thank this panel of witnesses for their valuable testimony. Members of the committee may have additional questions for the witnesses, and we ask that you respond to these in writing. The hearing record will be open for 10 business days to receive these responses.

I would like to ask Mr. Frazer to remain seated at the witness table as we call up our second panel of witnesses.

Call this meeting back to order. I would like to welcome Mr. Frazer back to the second panel. No need to give your testimony; I think everybody is well aware of you now. Thank you for staying around.

I would like to welcome the Honorable Dave Miller, the Commissioner of the Iron County, Utah, from Cedar City, Utah; Mr. Jennison, Secretary Jennison, from the Kansas Department of Wildlife and Tourism, from Topeka, Kansas. We had an opportunity yesterday to visit. Obviously, we talked a lot about my bill and the lesser prairie chicken, but I found the most interesting thing is he likes to sit around and brag about how he used to ride bulls and stuff.

I know he doesn't look like it, but he was actually, at one time, a pretty good guy that rode bulls a little bit with me, except his dad convinced him to quit riding, because he blew his knee out, and his dad bought him a horse and he thought he could pay it back by roping. That didn't work either. So, he really wasn't that good at rodeoing. I hope you are a better Secretary for Kansas, right, sir? Welcome to have you here.

Mr. Ya-Wei Li? OK, I am sorry about that, I was working on that. Director of Endangered Species Conservation with the Defenders of Wildlife in Washington, DC. Good to have you here, sir.

Ms. Donna Whitney? Wieting, Director of the Office of Protected Resources and National Oceanic and Atmosphere Administration in Washington, DC, and Mr. Tom Birmingham, General Manager and General Counsel of the Westlands Water District from Fresno, California. Mr. Tom Ray—no? That was first panel?

So, I think that is it. I appreciate you guys being here. We would like to remind everybody that your testimony will be—as a reminder—where am I at? Witnesses are reminded that their complete written testimony will appear in the hearing record, and I will ask that you keep your oral comments to 5 minutes.

As a reminder, when you begin to speak, our clerk will start the timer and the green light will appear. After 4 minutes a yellow light will appear. And at that time you should begin to conclude your statement. At 5 minutes the red light will come on, and you will complete your sentence, but I may ask that you stop, and you stop thereafter.

We would like to let Mr. Stewart introduce your witness, sir.

Mr. STEWART. Thank you, Mr. Chairman, and thank you and the others of the committee for allowing me to speak, even though I don't sit on the committee any longer, something that I miss, and appreciate the great work that you and other members have done. And it is an honor for me to be able to introduce a good friend of mine, someone who we have worked closely with for several years now, Commissioner Dave Miller from Iron County, in the center of my district.

He has the great honor of representing, really, one of the beautiful and unique districts in, really, I would say, the entire country. He is doing such a fabulous job of this that he is running unopposed this year, something that many of us are obviously envious of, but it is because he has a reputation for being a serious commissioner, and a serious leader, and we thank you, Dave, for your example in that.

He and I have worked together on a couple different issues that are very meaningful to his county, and also my district, and one of them is PILT, and another is the subject we are talking about today, and that is the enormous impact that Endangered Species has had on his county and on other counties throughout the district, particularly with Utah prairie dogs. And he has been a valuable ally in this, and we have had success, and I would think meaningful success, in the last 6 or 8 weeks in resolving some of these issues, working not only with other commissioners, but with Gary Frazer and Director Dan Ashe, who has been a valuable ally for us, as well.

So, we look forward, Commissioner, to hearing your testimony today. Thank you once again for the great work that you have done in representing Iron County and also the great State of Utah.

Thank you, Mr. Chairman, I yield back.

The CHAIRMAN. Commissioner, you can begin your testimony.

**STATEMENT OF DAVE MILLER, COMMISSIONER, IRON  
COUNTY, UTAH, CEDAR CITY, UTAH**

Mr. MILLER. Mr. Chairman, Congressman Stewart, appreciate each one of you, also all the esteemed members of the committee. It is really an honor and a privilege for me to come back and spend time here, in this setting. Despite the comments of Mr. DeFazio, where this may be a waste of time, I hope it is not. We came here, took time away from my family, flew all night last night, got in at 8:00 this morning. And, frankly, this is a very important item of discussion for our community and—as is apparent that it is important across our beautiful and beloved Nation.

I preface my remarks by saying that the Endangered Species Act, with the good intentions that it originally was intended to bring forward, and still continues to offer, does require some improvement. And a couple things that I want to speak to will, I think, help illustrate that.

First of all, for nearly 40 years, the particular species in our community that was literally at the listing status prior to the inception of the Endangered Species Act in 1973, the Utah prairie dog, that was defined as a distinct and endangered species, that development of that condition in Iron County, the county that I represent, has proved that, for these many decades, very little was occurring in the actual recovery and progress being made in doing what the intent of the ESA is intended to do.

And nearly a year ago, just over a year ago, shortly after I became involved on the Commission, we made a decision that we were no longer going to accept the status quo. And I think, overall, I think that is the importance of this congressional hearing today, is that accepting the status quo is not acceptable. And we pointed out and proved that we can accomplish the beneficial effort of protecting species and helping to move them toward the recovery that is intended without having to subject citizens to all of the inconveniences and flat-out damages that have occurred by impacting their private property. And I have heard that from many of the other testimonies, that that is occurring across the land.

And as we set forward in a summit, where we met with Ranking Members of the state, we had high-level representatives from the Fish and Wildlife, and we said we will not accept moving forward—or staying where we are at, the status quo, without moving forward and getting to some goals. We set those goals, and we have had tremendous success. And I think that this is an example of where this particular issue that I am here to testify to is valid and, really, the need to improve the Endangered Species Act on a whole.

One issue, one significant issue, is the fact that the Utah prairie dog exists on nearly 70—70 percent of the population exists on private property, and that species, as it exists, it literally inhibits the use of private property to the degree that we have had tens, if not hundreds of millions of dollars of economic impact, while we have had exponential growth of the numbers of Utah prairie dogs in their population.

So, we have set forward several goals. But the most important part of this particular bill that I am here to testify to is that, as we work together to delist the species, and we recover the species, and we look at the fact that those that are on private property, as

we make the argument that those species are critical to the overall recovery, and that they are protected, and as a state, and as county, as local governing bodies we provided added regulatory assurity that that particular species will not be relisted at some future time, it becomes very important and imperative for us to work on this together.

And, as we do that, it ultimately will provide for the end goal of allowing for all species to be counted, all numbers of the species to be counted. And it actually removes that adversarial situation that is apparent in our community, and apparent throughout the Nation.

So, those are my remarks.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF DAVID MILLER, CHAIRMAN, IRON COUNTY BOARD OF COMMISSIONERS ON H.R. 4256

As Chairman of the Iron County Board of Commissioners, a political subdivision of the State of Utah, acting on behalf of citizens of Iron County, I submit this written testimony in connection with verbal remarks I intend to share at the Legislative Hearing to be held on September 9, 2014 before the Committee on Natural Resources.

I preface my remarks by saying that I am honored to speak in favor of work that is moving forward in the House of Representatives by each Congressman presenting improvements to the Endangered Species Act. Americans with few exceptions, especially in rural America, understand what it means and what it takes to care for the land, the environment and the species, both plant and animal, that inhabit shared space. The unintended consequences resulting from the current processes under the Endangered Species Act especially where preemption of fundamental rights of U.S. citizens has reached a feverish pitch undermining the very purposes of America and downplaying the value of the ESA. It is causing alarm and disgust amongst countless Americans experiencing irreparable damage many of whom are found powerless to participate in the process for the good of all involved. With that introduction let it be stated for the record that there does need to be dramatic adjustments made to the ESA shifting from the broad, expensive federally driven political solutions to localized state and interstate agreements for many reasons some of which follow.

By its very definition a species that is endangered or threatened has vulnerable populations and habitat leading to the risk of becoming extinct. Based on this simple understanding there are limited geographical locations where these species are found. Some are found highly localized, others are found interstate or even international. Whatever the case may be as far as geographical locations are concerned, in large part, should be driven by the respective affected jurisdictions. Sadly, it has become increasingly evident that Non-Governmental Agencies are driving the agenda and continue to enrich themselves on the backs of American taxpayers through sue and settle arrangements with USFWS invoking the protections afforded under the Equal Access to Justice Act. This litigious model, by so called non-profit organizations, has not only harmed the American economy by nearly shutting down our Primary and Secondary sectors of Industry but it has further divided the Nation because of the disregard many of the outspoken environmental advocates have for private property and the protections afforded by both Federal and State Constitutions for the same.

That leads me to address the current reality and how the proposed improvements suggested by Congressman Stewart to the Endangered Species Act are not only crucial but legitimate adjustments to an Act that has been in existence long enough to identify the shortcomings and instigate much needed improvements. This bill known as H.R. 4256 simply illustrates a way to improve a severe inconsistency in the way the living populations of species are counted. Currently internal rules exclude counting populations toward recovery objectives because they may be found on state, tribal or private property. Suffice it to say those private property owners who are restricted, impacted and often is the case found damaged as a result of the poor processes and coordination efforts are less than enchanted with the so-called protections of life, liberty and property or lack thereof.

The argument that populations found on private property, if delisted from a listing status, would instantly be reduced because of a lack of protections demonstrates the divide between interested parties. It is preposterous that local interests would

allow, once a species is delisted, the population to merit a listing status again. Further, it is at the local level that the best and most effective management policies and practices can be put in place with the least cost. However the more the damage to the affected, local economy continues the less likely the resources necessary to expedite the betterment of efforts for recovery at the local level will be available thereby forcing more Federal dollars to be expended. Dollars the United States does not have.

Although I could speak ad infinitum to the immediate impacts in our community and the expanded negative effects throughout our country of what was intended to be a good law but is in fact a poorly conceived and administered program, I will conclude my written remarks by saying that I believe in the idea of America. I believe in America. I believe in the culture, the freedom, the goodness, the foundational principles and the constitutional organization that, when implemented, continues to shine a light in a world of ever expanding dismal darkness. Adopting this measure addresses the inconsistency that architecturally currently place endangered species in an adverse relationship with state, tribal and private property owners and allows the advantages of localized involvement, shared responsibility and opportunity for recovery of endangered and threatened species while mitigating the negative relationship with the USFWS and the Congress of the United States.

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Mr. MULLIN. Thank you for your testimony.

We will now recognize Mr. Huelskamp to introduce your guest.

Mr. HUELSKAMP. Well, thank you, Mr. Chairman. It is a pleasure to introduce Secretary Robin Jennison from the State of Kansas. Of course, I know Rob in different capacities. I would say he is first an environmentalist. In his real life he is a farmer. He is also an avid outdoorsman, and he has done a superb job of enhancing our game bird and other populations across the State of Kansas.

I think today we are going to hear about some innovative solutions, as well as some very interesting history, and put some truth in the matter here, and identify the source of the problem, and what the State of Kansas would like to do, and have the freedom to do that, and develop the lesser prairie chicken, or other populations across the State of Kansas.

So, it is a pleasure to have you here, Mr. Secretary, thank you for coming all the way here and delivering some enlightenment of the history of the lesser prairie chicken in our great state. Thank you so much.

Thank you, Mr. Chairman.

**STATEMENT OF ROBIN JENNISON, SECRETARY, KANSAS  
DEPARTMENT OF WILDLIFE PARKS AND TOURISM, TOPEKA,  
KANSAS**

Mr. JENNISON. Thank you, Mr. Chairman, and Congressman Mullin. Appreciate you taking the initiative to get this important legislation introduced. And, Congressman Huelskamp, thank you.

Appreciate the opportunity to testify on H.R. 4866. The Kansas Department of Wildlife Parks and Tourism supports H.R. 4866. In short, and on a practical basis, it gives the lesser prairie chicken the opportunity to rebound from a drought unlike the plains have seen since the dust bowl of the thirties, or the droughts of the fifties.

To more completely explain the Kansas Department of Wildlife and Parks' support for H.R. 4866, it is important to emphasize two points. First, philosophically and most important, our department has the authority and is equipped to more appropriately manage

the wildlife within the borders of Kansas than the U.S. Fish and Wildlife Service. Second, the reduced numbers of prairie chicken at the time of the listing decision were the result of an extended drought. This resulted in not only a decrease in lesser prairie chicken numbers, but similar declines in other game birds, such as pheasant and quail. And it was noted at the time of the listing decision that the prairie chicken that year had dropped by 50 percent. This last year it has increased by 20 percent.

Both of those were the result of climactic conditions at the time. The 50 percent reduction was about a 5-year drought in the southwest part of the state, and with a modest return to moisture in the western part of the state, in a little more of the prairie chicken range we saw a 20 percent increase.

As you know, Congress passed the Endangered Species Act in 1973. Kansas followed closely behind in 1975. We are authorized to conduct investigations in order to develop biological and ecological data to determine conservation measures necessary for a species' ability to sustain themselves. Additionally, the department has the jurisdiction to implement conservation.

And it was noted in the previous testimony a lot of people think that if U.S. Fish and Wildlife isn't there to implement the Endangered Species Act, you would think that no one is there. Well, that is not true, because the states are there. And, in fact, in Kansas, we have listed 24 species as endangered, 36 as threatened, and we have 76 species in need of conservation. So the question that was asked, "Is it the looming litigation that is causing all this to answer," at least in Kansas the answer is no.

Kansas, the Kansas Department of Wildlife Parks and Tourism, and the 400 professionals that make up our department, take very seriously the charge that authorized our agency to improve the natural resources and to plan and provide for the wise management thereof. Dating back to 1905, the department, its leadership, and its employees have a distinguished history of conservation, innovation, and being at the forefront of wildlife management. That record is even more remarkable when you consider that 97 percent of the land in Kansas is in private ownership.

Time does not permit to scratch the surface on this distinguished history, but one of the things that I was not going to bring up, but am going to because it was brought up earlier, was the whooping crane. Kansas has a 20,000-acre marsh that we have created, the biggest inland marsh in North America. We just spent \$4.5 million to upgrade a ditch system to pipe. And one of the visitors to that is the whooping crane. I think it goes to the importance that the states put on these species, just as much as the Federal Government.

Those of us charged with conservation of our natural resources and authorized to use the regulatory process to implement those endeavors, must be cognizant of the social and economic impacts or the weight of public opinion will result in its undoing. Should that occur, the losers will be our children and grandchildren. The Kansas Department of Wildlife Parks and Tourism and other state wildlife agencies are far better equipped to find that balance than the U.S. Fish and Wildlife Service. The one-size-fits-all approach of

the Federal Government cannot find the balance in the various states.

Conservation is too important to jeopardize its future with burdensome regulation or continual litigation. Environmentalists, conservationists, and natural resource agencies should unite behind voluntary incentives, so we can have a true partnership with private property owners to preserve the diversity of our natural resources.

And, real quickly, to address specifically the lesser prairie chicken in Kansas, it is hard for Kansans to understand this listing, when we have a growing range of prairie chicken, and a growing number of prairie chicken. We did not count prairie chicken before 2001 in the short grass/CRP mosaic, because there weren't any. Now we have over 10,000 prairie chicken in that. The range grew about 100 miles from the Arkansas River to Interstate 70.

Mr. Chairman, thank you for the opportunity to testify on this issue.

[The prepared statement of Mr. Jennison follows:]

PREPARED STATEMENT OF ROBIN JENNISON, SECRETARY, KANSAS DEPARTMENT OF  
WILDLIFE PARKS AND TOURISM ON H.R. 4866

Chairman Hastings and members of the Committee on Natural Resources, thank you for the invitation to testify on H.R. 4866. The Kansas Department of Wildlife Parks and Tourism (KDWPT) supports H.R. 4866. In short, and on a practical basis, it gives the Lesser Prairie Chicken (LPC) the opportunity to rebound from a drought unlike any the plains have seen since the 1930s dust bowl or the 1950s drought.

To more completely explain KDWPT's support for H.R. 4866, it is important to emphasize two points. First, and philosophically most important, KDWPT has the authority and is equipped to more appropriately manage the wildlife within the borders of Kansas than U.S. Fish and Wildlife Service (USFWS). Second, the reduced numbers of prairie chicken at the time of the listing decision were the result of an extended drought. This resulted in not only decreased LPC numbers, but similar declines for other game birds such as pheasant and quail.

As you know, Congress passed the Endangered Species Act in 1973. Kansas followed closely with its passage of the Kansas Nongame and Endangered Species Act in 1975. KDWPT is authorized to conduct investigations in order to develop biological and ecological data to determine conservation measures necessary for a species' ability to sustain themselves. Additionally, the department has the jurisdiction to maintain a list of species in need of conservation, as well as the rule and regulatory authority to implement such conservation. Currently, Kansas has listed 24 species as endangered, 36 as threatened, and 76 as species in need of conservation. These 134 species include invertebrates, fish, amphibians, birds, and mammals.

Kansas, the KDWPT, and the 400 professionals that make up the department, take very seriously the charge articulated in KSA 32-702 to improve the natural resources and to plan and provide for the wise management and use of the state's natural resources. Dating back to 1905, the Department, its leadership, and its employees have a distinguished history of conservation, innovation, and being at the forefront of wildlife management. That record is even more remarkable when you consider that 97 percent of the land in Kansas is in private ownership. Time does not permit me to even scratch the surface of that distinguished history, but one example is noteworthy.

During the 1940s and 1950s, the State of Kansas acquired 19,857 acres northeast of Great Bend, Kansas, and dikes were constructed to impound water in five pools. Canals and dams were built to divert water from the nearby Arkansas River and Wet Walnut Creek to supplement water provided by two intermittent streams, Blood and Deception creeks.

During the 1990s, extensive renovation sub-divided some of the pools. In addition, pump stations were built to allow for increased management flexibility and water level manipulation. This renovation effort also provided increased water conservation to better meet wildlife needs during dry periods. KDWPT just completed a \$4.5

million project to replace the canal from the Arkansas River with a more efficient underground pipe system. You may or may not recognize the name of the location, Cheyenne Bottoms, but I am certain you will recognize one of the species that rely on it for its migration, the Whooping Crane. Cheyenne Bottoms is the largest marsh in the interior of the United States. Cheyenne Bottoms was designated a Wetland of International Importance in 1988 by the Ramsar Convention on Wetlands, one of two sites in the state (the other being Quivira National Wildlife Refuge). Cheyenne Bottoms is also considered to be a wetland of global importance by the Western Hemispheric Shorebird Reserve Network (WHSRN).

This one example clearly illustrates the dedication of our Department and is intended to make the point that the USFWS and its employees are not any more dedicated or committed to conservation than KDWPT or our counterparts in the range of the LPC. Much of what KDWPT or any of the other state wildlife agencies have accomplished could not have been done without the partnership we have shared with USFWS. However, separate roles serve a purpose and some issues are better left to the states.

In 1997, the Kansas Legislature recognized that public support was important to the continued success of our conservation efforts and an effective Nongame and Endangered Species Act. KSA 32-960a included language for an advisory committee. One of the more significant charges of the committee is to "work with the secretary to adapt the listing of the species and the recovery plan for the species to social and economic conditions of the affected area."

Those of us charged with conservation of our natural resources and authorized to use the regulatory process to implement those endeavors, must be cognizant of the social and economic impacts or the weight of public opinion will result in its undoing. Should that occur, the losers will be our children and grandchildren. KDWPT and other state wildlife agencies are far better equipped to find the balance than the USFWS. The one-size-fits-all approach, cannot find that balance in the various states. Conservation is too important to jeopardize its future with burdensome regulation or continual litigation. Environmentalist, Conservationist, and Natural Resource Agencies should unite behind voluntary incentives so we can have a true partnership with private property owners to preserve the diversity of our natural resources. H.R. 4866 recognizes the potential of those partnerships and instructs the Secretary of Interior to monitor and report on their progress.

The annual fluctuation of LPC numbers is not new. Kansas' attention to the LPC is not new either. In the early 1950s a department publication stated, "In southwest Kansas where the lesser prairie chicken, *Tympanuchus pallidicinctus*, holds forth, it is commonplace for the numbers of this bird to fluctuate widely." In that time period Kansas trapped and transplanted LPC to spread seed stock and bring the birds back more quickly. Under Director Dave Leahy, the department even experimented with propagation of the LPC.

In a press release dated October 3, 2012, Bill Van Pelt, Western Association of Fish and Wildlife Agencies (WAFWA) Grassland Coordinator, stated, "Historically, we saw conditions like we are observing now in the 1930s and we thought the species went extinct." In reviewing KDWPT 1950 archives, we found a statement from State Game Protector Eddie Gebhard. Gebhard believed there were only two small flocks that survived the 1930s in Kansas, one in Meade County and one in Seward County. Gebhard went on to say, "Since these drought years these two small flocks and possibly some migrants from Oklahoma, have made a considerable comeback in Kansas." This is relevant as it highlights two historical weather extremes. Relatively speaking the LPC are in a much better position to recover today as compared to the time immediately following the 1930s when Gebhard noted they made a considerable comeback. Additionally, wildlife biologists would note that prairie chicken numbers can fluctuate up and down from year to year, mainly due to grassland habitat conditions influenced by rainfall.

Kansas currently harbors the most extensive remaining range and largest population of the lesser prairie chicken among the distinct populations found in the five states where it occurs (KS, TX, NM, OK, CO). The highest densities of LPC occur north of the Arkansas River where seeded CRP grasslands are present in close proximity to native mixed prairies of the Pawnee, Walnut, and Smoky Hill drainages in west-central Kansas. This has been the case for most of the last 12-15 years. However, the densities get equally as high in our native rangelands to the south when we string together a couple of good production years. The fact that the highest densities across the range occur north of the Arkansas River is a testament to the success of voluntary conservation programs. The LPC was thought to have been extirpated from that portion of its historic range until CRP came along. This expan-

sion of lesser and greater prairie chicken populations in west-central Kansas has brought these two historically overlapping species back together in a zone ranging from 20 to 40 miles in width. Some mixed leks with cocks of both species now occur in this zone of overlap.

Lesser prairie-chickens occupy two basic types of habitat which are native rangeland and planted native grasses that have been established primarily through the conservation reserve program (CRP). The total amount of grassland within Kansas' LPC range is nearly 10 percent greater now than in 1950 due to the addition of CRP to the landscape (Kansas State University, unpublished data). In recent years, much concern has arisen about the future of CRP due to a 28 percent decline in enrolled acres within Kansas' LPC range from 3,124,812 in 2008 to 2,242,373 in 2014 (USDA data). However, a recent assessment of images from the National Agricultural Imagery Program (NAIP) found that 90 percent of the CRP acres expired from 2008–2011 were still being maintained as grasslands in 2012. Similarly high percentages ranging from 73–97 percent were calculated for the other four LPC states (WAFWA LPC Plan).

Additionally in 2008, the Natural Resource Conservation Service (NRCS) launched the Lesser Prairie-Chicken conservation Initiative (LPCI). The objective of this initiative is "to increase the abundance and distribution of the LPC and its habitat while promoting overall health of grazing lands and long-term sustainability of ranching operations. Through the LPCI, NRCS is partnering with all five wildlife agencies within the LPC range, Kansas Forest Service, USFWS Partners for Fish and Wildlife Program, LPC Interstate Working Group, National Fish and Wildlife Foundation, National Wildlife Foundation, Pheasants Forever, Playa Lakes Joint Venture, Rocky Mountain Bird Observatory, The Dorothy Marcille Woods Foundation, Texas Wildlife Association, and The Nature Conservancy. Since the inception of LPCI, a total of 84,000 acres of prescribed grazing has been implemented within Kansas' LPC range (NRCS data). These LPCI acres are additive to the >350,000 acres across Kansas' LPC range that were contracted through traditional NRCS programs over the same time period (NRCS data).

Development impacts within suitable patches of vegetation can also eliminate LPC usable habitat. The data available from numerous industries indicates that an average of a few hundred thousand acres is impacted by development each year in LPC range (WAFWA LPC plan). That sounds like a large figure by itself but the range encompasses roughly 40 million acres. Thus, development impacts have only compromised a very small percentage of the range over the last couple of years corresponding with the sharp annual decline in the LPC population. It would take many years of development alone at the current rate to affect enough of the LPC range to cause population level effects.

Given this information, it is likely that the recent LPC population decline of nearly 50 percent from 2012 to 2013 is almost totally related to drought conditions. Wide population fluctuations are not uncommon for LPC or other gallinaceous birds. The birds in this Order have wide population fluctuations because they depend upon annual production which is heavily influenced by rainfall due to its effect on nesting structure and foraging habitat. For example, in Kansas, the regional populations of pheasant and quail exhibit the same annual fluctuation as LPC illustrating the influence of weather (See Figs. 1 & 2). This year under a return to a more normal weather pattern the LPC saw a population increase of 20 percent.

Notwithstanding KDWPT's belief that the LPC is a state trust species of which Kansas has a long history of active and successful management, USFWS did not give appropriate consideration to the impact the severe record setting drought had on necessary habitat. KDWPT believes H.R. 4866 will allow time for both the LPC to recover from the drought and voluntary conservation efforts to take effect.

FIG. 1

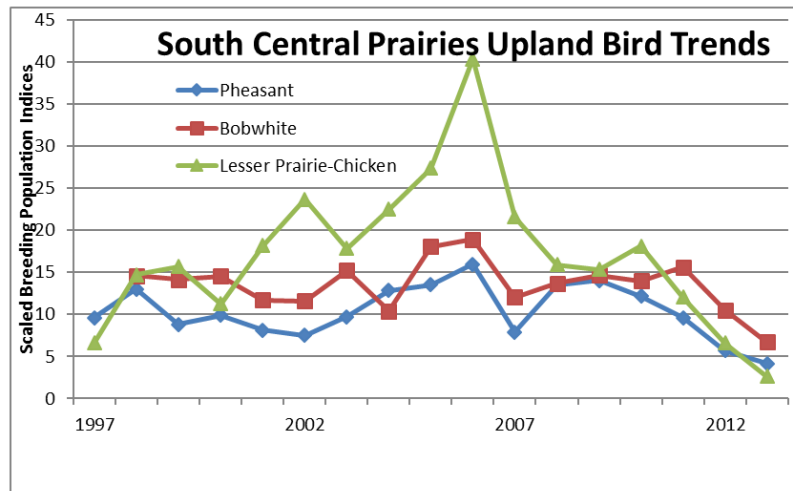
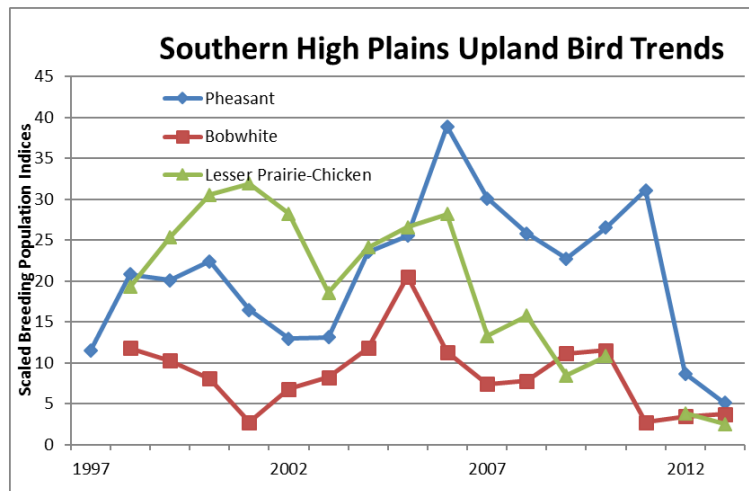


FIG. 2



The recent declines are due primarily to weather as illustrated by other gallina-ceous birds in the LPC range. The greater prairie-chicken trend for the Kansas Smoky Hill region, which is the region immediately adjacent to the eastern edge of the LPC range, also correlates with the LPC trends.

Mr. MULLIN. Thank you, Mr. Secretary. The Chair will now recognize Mr. Ya-Wei Li. I apologize about earlier, about messing up with your name. But by the end of this thing I will have it down right.

Mr. LI. You had it right, thank you.

**STATEMENT OF YA-WEI LI, DIRECTOR, ENDANGERED SPECIES CONSERVATION, DEFENDERS OF WILDLIFE, WASHINGTON, DC**

Mr. LI. Mr. Chairman and members of the committee, thank you for inviting me to testify today. My name is Ya-Wei Li, and I am the Director of Endangered Species Conservation at the Defenders of Wildlife.

The timing of this hearing is very ironic, because it was 100 years ago last Monday that Martha, the last passenger pigeon, died at the Cincinnati Zoo. It was a tragic end for a species that was once the most common bird in all of North America. People reported seeing flocks so large that they eclipsed the sun for hours. But in less than 50 years, 5-0, we brought the bird from billions to none. It was America's first famous extinction and we were responsible. We decimated the bird faster than they could reproduce. We lacked knowledge to properly balance our needs with those of the lesser prairie chicken.

But we learned from that hard and shameful lesson. We learned how we affect the natural world, and to correct course, if needed. Today we have tools to head off extinction, tools like the Endangered Species Act.

The ESA was not passed as part of some radical, anti-development, anti-corporate agenda. It was passed with overwhelming bipartisan congressional support, and signed into law by a Republican president as an expression of the quintessential American value that we protect what is ours. It was a statement that America's wildlife and natural resources have value.

The six bills before us reject those values. They abolish protections for endangered species and obstruct recovery efforts. They sunset the protections of the ESA, as if the extinction crisis were over, as if no more imperiled species needed further protection, as if we have learned nothing from the passenger pigeon.

In reality, we need every tool under the ESA and every dollar we can muster to prevent more extinctions and accelerate more recoveries. We need to do things like promptly listing species that, in fact, warrant protection, to safeguard their habitats, to incentivize private landowners to voluntarily conserve species on their lands, to fund recovery efforts at meaningful levels, and to set strong recovery goals so that no species needs to revisit the ESA emergency room after it has been delisted.

Unfortunately, none of the bills embraces these common-sense strategies. And none adopts the many recommendations for improving ESA implementation from the National Academy of Sciences and the U.S. Government Accountability Office, even though Congress has entrusted these very entities with providing independent, non-partisan advice.

The bills do not reflect serious efforts to advance the ESA's goal of preventing extinctions and recovering species. Let me just give you a few examples of some of these problems.

H.R. 4256 is so poorly drafted that it is hard for me to say exactly what it does. At a minimum, the bill seems to require the services to count all individuals of a species in determining whether it is recovered. The problem is that individuals on unpro-

tected—that is right, unprotected—lands must also be counted toward recovery goals, even in areas that are destined to be bulldozed in the future. This requirement would be disastrous for species like the Utah prairie dog, which has most of its populations right now on unprotected lands facing development pressure.

And what about H.R. 1927? Well, the ESA is often a scapegoat for an array of environmental problems, and this bill is a classic example of that blame-shifting. California is in a historic drought that has diminished water supplies to farmers and cities across the state. Nature, not environmental regulations, is the principal cause of this suffering. The bill would do virtually nothing to help farmers in this severe drought, while driving endangered species in the Bay Delta estuary closer to extinction.

And H.R. 4866, well, it seems to contradict nearly everything that the science tells us about the lesser prairie chicken. Sixteen years ago the Fish and Wildlife Service already found that the species warrants listing as a threatened species—16 years ago. Now that the listing has been finalized, the bill seeks to unravel those protections, gambling the bird's fate on a recently adopted range-wide plan that would be unenforceable, unproven, and unable to stop the hemorrhaging.

So, in closing, the bills undercut not only the ESA, but America's belief that our wildlife have value, that we must balance our economic growth with protecting our natural resources, and that we must never accept another tragedy like the one that happened on September 1, 1914.

Thank you for hearing my testimony.

[The prepared statement of Mr. Li follows:]

PREPARED STATEMENT OF YA-WEI LI, DIRECTOR, ENDANGERED SPECIES  
CONSERVATION, DEFENDERS OF WILDLIFE

*"When the last individual of a race of living things breathes no more, another  
heaven and another earth must pass before such a one can be again."*

—William Beebe (1906)

Mr. Chairman and members of the committee, thank you for the invitation to testify today. I am Ya-Wei Li, the Director of Endangered Species Conservation at Defenders of Wildlife, an organization dedicated to protecting and restoring imperiled animals and plants in their natural communities. The Endangered Species Act (ESA) is central to that mission.

This hearing comes at an ironic time. It was 100 years ago last Monday that a lone bird named Martha, the last passenger pigeon, died at the Cincinnati Zoo. It was a tragic end for what was once the most common bird in North America, numbering in the billions. American homesteaders reported seeing flocks so large they eclipsed the sun for hours, and so numerous they took 3 days to pass.

But in less than 50 years, unchecked expansion brought the bird from billions to none. It was America's first famous extinction, and humans were responsible. We decimated the birds faster than they could reproduce. We lacked the knowledge to properly balance our needs with those of the passenger pigeon, to ensure economic growth while protecting our natural heritage.

But we learned from that hard and shameful lesson. We learned how we affect the natural world and to correct course if needed. Today, we can often diagnose species in decline before they pass the point of no return. We also have tools to head off extinction, tools that came too late for the passenger pigeon but not for the bald eagle, American alligator, peregrine falcon, and hundreds of other species that thrive today—tools like the Endangered Species Act.

The ESA, like the Clean Air Act and Clean Water Act, was not passed as part of some radical anti-development, anti-corporate agenda. It was passed by wide bipartisan majorities in Congress and signed into law by a Republican president as an expression of the quintessential American value that we protect what is ours.

It was a statement that America's wildlife and natural heritage have value and should be protected for future generations, sentiments that are still echoed strongly in public opinion surveys today.

The six bills before us reject those values and do nothing to conserve imperiled species. They abolish protections for endangered wildlife and seriously obstruct recovery efforts. They sunset the protections of the ESA, as if the extinction crisis were over,<sup>1</sup> as if no more imperiled species needed further protection,<sup>2</sup> and as if we had learned nothing from the passenger pigeon. In reality, we need every tool under the ESA and every dollar we can muster to prevent more extinctions and recover more species. We need to promptly list species that warrant protection, safeguard their habitats, fund recovery efforts at meaningful levels, encourage landowners to voluntarily conserve species, and set strong recovery goals so that no species needs to revisit the ESA emergency room after it has been delisted. Regrettably, none of the bills embraces these common-sense strategies. And none aligns with the myriad of recommendations for improving ESA implementation from the National Academy of Sciences and the U.S. Government Accountability Office—even though Congress entrusts these entities with providing independent, nonpartisan advice. Instead, the bills reflect the recommendations from a report finalized in February by a partisan and self-appointed “ESA Working Group.” The recommendations threaten to radically alter the ESA for the worse, undercutting decades of conservation progress by the U.S. Fish & Wildlife Service and the National Marine Fisheries Service (Services) and their many partners. The bills do not reflect serious efforts to advance the ESA's goals of preventing extinctions and recovering species. Below are a few examples of the many problems with the bills.

#### **H.R. 4256**

This bill is poorly written, rife with ambiguity, and biologically indefensible. At one level, it seems to require the Services and state wildlife agencies to count every individual of a species before listing, downlisting, or delisting it. This mandate would be impossible to meet for many listed and candidate species because they are often extremely difficult to find and costly to count. Fish and aquatic invertebrate species would be particularly challenging because many are microscopic in their larval stage. Another major hurdle is that Federal and state agencies generally need landowner consent to access private property, where many listed species live. Because of these obstacles, new listings, downlistings, and delistings would come to a halt. Extinctions would become ordinary, while recoveries extraordinary.

The bill also seems to require the Services to count all individuals of a species in determining whether it has met recovery criteria. Individuals on unprotected lands must be counted, even in areas destined to be bulldozed in the future. This requirement would be disastrous for species like the Utah prairie dog, with less than 4 percent of individuals on protected lands and much of the remaining populations in areas facing growing pressure from agricultural and urban development. By prematurely delisting the prairie dog and many other species, the bill will reverse decades of recovery progress and leave the species at high risk of extinction.

#### **H.R. 4866**

H.R. 4866 contradicts nearly everything that science tells us about the lesser prairie chicken. As early as 1998, the Fish & Wildlife Service found that the bird met the ESA's definition of a threatened species. But without Federal protections, the species continued to lose habitat and decline. The situation became so dire in 2008 that the agency escalated the bird's priority for ESA listing to 2 out of 12, a number reserved only for species facing threats that are both “imminent” and of a “high magnitude.” The bird's population crashed again in 2012, this time by 50 percent. A few months ago, the Fish & Wildlife Service finally listed the bird as threatened.

Despite the overwhelming evidence that the lesser prairie chicken has slipped closer to extinction, H.R. 4866 reverses the agency's recent listing decision and suspends ESA protections for the species until 2020 or later. The bill gambles the bird's fate on the recently adopted Range-Wide Plan for the Lesser Prairie Chicken, which is unenforceable, unproven, and unable to stop the hemorrhaging. The plan does not

<sup>1</sup> Rodolfo Dirzo et al., *Defaunation in the Anthropocene*, 345 *Science* 401 (2014) (“We live amid a global wave of anthropogenically driven biodiversity loss: species and population extirpations and, critically, declines in local species abundance.”).

<sup>2</sup> David S. Wilcove & Lawrence L. Master, *How Many Endangered Species are There in the United States?*, 3 *Frontiers in Ecology & the Environment* 414 (2005) (“We review the best available data on the status of plants, animals, and fungi in the US and conclude that the actual number of known species threatened with extinction is at least ten times greater than the number protected under the Endangered Species Act (ESA).”).

require developers to avoid the most important habitats for the species or limit the amount of total habitat disturbed. It even allows permanent impacts from oil and gas development to be offset by short term mitigation measures, based on the theory that “unlike other grouse species, [lesser prairie chicken] appear to be adaptable to changing habitat conditions (i.e. structure, grass species composition etc.), which can be created in a relatively short time period (within 2–8 years).”<sup>3</sup> The only citation for this “moving conservation concept” is a paper about a proposed mitigation system for the saiga antelope in Uzbekistan. To base a recovery strategy on the absurd notion that a prairie chicken is like a Uzbekistan antelope defies logic, but this is the flimsy biological foundation of H.R. 4866.

#### **H.R. 1927**

The ESA is often a scapegoat for an array of environmental problems, and H.R. 1927 is a classic example of that blame-shifting. California is in its third year of a historic drought that has diminished water supplies to farmers and cities across California, including in the San Joaquin Valley. Drought, not regulations, is the primary cause of those woes. The Director of the California Department of Water Resources has stated that “the great majority of water shortage this year is purely a basis of drought. It’s not regulation.”<sup>4</sup> Even the State Water Contractors, an association of agencies that purchase water from the California State Water Project, recently acknowledged that ESA protections “have minimally affected water deliveries over the past six months . . .”<sup>5</sup> Unless the bill can summon rainfall, it will do nothing for farmers and more damage to California’s native fisheries, which support thousands of jobs in the state.

The “ESA Working Group” recently recommended legislation to “empower states” on ESA decisions. Ironically, H.R. 1927 does the exact opposite. It would preempt existing state and Federal laws that regulate water diversions at the Bay-Delta estuary. The State of California, for example, could not protect its state-listed endangered species that inhabit the estuary. This year, water districts and conservation groups worked together to support a \$7.5 billion water bond recently approved by the state legislature, a measure to fund safe drinking water projects, new ground and surface water storage, watershed restoration, water conservation, and other real solutions to the water crisis. H.R. 1927 is a divisive measure that jeopardizes passage of the water bond at the upcoming November election. Similar House legislation such as H.R. 3964, which overrides environmental protections in current California State law, was opposed by the state’s Governor, both senators, a majority of the state’s house of delegation, and dozens of citizen groups. The bill is foisting upon California what it clearly does not want. There is no “empowerment” here.

#### **H.R. 1314**

This bill undermines the efficient resolution of ESA listing and critical habitat disputes, delaying protections for species and wasting Federal Government resources. Any state or county could veto a proposed settlement to list a resident species or designate its critical habitat. There is no requirement to intervene in the lawsuit, consult with the litigants, or justify the veto. A county, at its whim, could derail a proposed settlement even if all plaintiffs and defendants agree to it. Because of this likelihood that a proposed settlement could fail for reasons beyond the control of the litigants, their incentive to settle is vastly diminished. Listing disputes that typically would have been resolved at the outset will now continue for months, if not years, draining government resources and delaying protections for imperiled plants and animals.

#### **H.R. 4284**

This bill creates a cynical detour around the protections of the ESA, sending species down a dead end road. It would allow the Services to decide whether to list a species based on vague and undefined State Protective Actions, instead of the ESA’s definitions of threatened and endangered. The Services could approve State Protective Actions as a substitute for listing, even if those actions are not enough

<sup>3</sup>Van Pelt et al., *The Lesser Prairie-Chicken Range-wide Conservation Plan* (Oct. 2013), pg. 93.

<sup>4</sup>Alex Breitler, “It’s not regulation,” *Environmental blog*, Apr. 1, 2014, available at: <http://blogs.esanjoaquin.com/san-joaquin-river-delta/2014/04/01/its-not-regulation/>.

<sup>5</sup>Doc. # 166, Motion for Leave to File a Reply in Support of Appellees Kern County Water Agency, Coalition for a Sustainable Delta, State Water Contractors, and Metropolitan Water District of Southern California’s Petition for Rehearing En Banc, Case No. 11–15871, *San Luis & Delta Mendota Water Authority et al. v. Salazar*, Ninth Circuit Court of Appeals, June 23, 2014, at pp. 1–2.

to adequately conserve a species. For example, the Fish & Wildlife Service could conclude that a species no longer requires listing based on the unenforceable promise of landowners to restore the species' habitat. The restoration need not have even occurred or proven effective for the species. The bill creates the illusion, but not the reality, of conservation.

The bill also sets the stage for returning primary management responsibility of listed species to states. Unfortunately, most states lack the resources and legal authority to adequately protect listed species. In general, their laws do not regulate habitat destruction that directly harms an endangered species and do not protect plants, which make up 56 percent of all U.S. listed species. Another shortfall is state spending on imperiled species, which is generally only a small fraction of what Federal agencies spend. Further, Fish & Wildlife Service data from 2012 show that 13 states spent less than \$100,000 on endangered species conservation. Kansas, for example, reported spending only \$32,000. If states want to resume primary management responsibility for imperiled species, they should enact stronger laws and commit more resources to protect those species before they decline to the point of becoming threatened or endangered.

#### **H.R. 4319**

As with many of the bills being considered, H.R. 4319 overrides the Services' scientific judgment about how best to conserve listed species. It would require the Services to exclude any area from critical habitat if the benefits of exclusion outweigh the benefits of inclusion—even if the exclusion would jeopardize the species' recovery. In no way does the bill help prevent extinctions or recover species. In fact, it contradicts the recommendations of the National Academy of Sciences:

Because habitat plays such an important biological role in endangered species survival, some core amount of essential habitat should be designated for protection at the time of listing a species as endangered as an emergency, stop-gap measure. As discussed below, it should be identified without reference to economic impact.<sup>6</sup>

The bill is nothing more than a concession to those who seek to develop or destroy endangered species habitat without having to consider how their actions affect the species.

The bill would also cripple the Services' conservation programs with the requirement to consider the economic effects of every critical habitat designation on land and property values, water and other public services, employment, and government revenue. The Services would need to increase their staff considerably to meet this obligation. Instead of spending their limited resource to recover species, the Services would use it to complete analysis that does nothing for recovery. The tragic result is that critical habitat designations would slow to a crawl, especially because the Services already lack the resources to complete all listing and critical habitat decisions within the statutory deadlines.

#### **What have we learned since 1914?**

We could have saved the passenger pigeon with the Endangered Species Act and our current understanding of conservation biology. Yet the six bills rob us of these tools, as if we learned nothing from Martha's death. They override the scientific judgment of Services biologists on listings, critical habitat, consultations, and recovery planning. They prevent citizens from helping to enforce violations of the ESA. They even deny the lesser prairie chicken the protections for which it has waited 16 years. Perhaps most importantly, they eviscerate America's belief that our wildlife have value, that we must balance economic growth with the need to protect our natural heritage, and that we must never accept another tragedy like the one on September 1, 1914.

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Mr. MULLIN. Thank you. Ms. Donna Whitney—Wieting, I am sorry—

Ms. WIETING. That is quite all right.

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<sup>6</sup>National Research Council, Science and the Endangered Species Act 7 (1995).

**STATEMENT OF DONNA WIETING, DIRECTOR, OFFICE OF  
PROTECTED RESOURCES, NATIONAL MARINE FISHERIES  
SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINIS-  
TRATION, WASHINGTON, DC**

Ms. WIETING. Good morning, Mr. Chairman and members of the committee. Thank you for the opportunity to testify before you today. My name is Donna Wieting, and I am the Director of the Office of Protected Resources for the National Oceanic and Atmospheric Administration's National Marine Fisheries Service.

The purpose of the Endangered Species Act is to conserve threatened and endangered species and their ecosystems. Congress passed this law on December 28, 1973, recognizing that the natural heritage of the United States was of aesthetic, ecological, educational, recreational, and scientific value to our Nation and its people. It was understood that, without protection, many of our Nation's living resources would become extinct.

The Endangered Species Act has been successful in preventing species extinction. Less than 1 percent of the species listed under this law have gone extinct, and over 30 species have recovered.

The National Marine Fisheries Service recently delisted the Eastern population of Steller sea lion. This is the first delisting that has occurred because of recovery since 1994, when we delisted the now thriving population of Eastern Pacific gray whales.

Actions taken under the Endangered Species Act have also stabilized or improved the downward population trend of many marine species. For example, in 2013, when we saw record returns of nearly 820,000 adult fall chinook salmon passing the Bonneville Dam on their way up the Columbia River to spawn. This is the most fall chinook salmon to pass the dam in a single year since the dam was completed in 1938, and more than twice the 10-year average.

Recovery of threatened and endangered species is a complex and challenging process. We engage in a range of activities under the ESA that include listing species, designating critical habitat, consulting on Federal actions that may affect a listed species or its designated critical habitat, and authorizing research to learn more about protected species.

We also partner with a variety of stakeholders, including private citizens, Federal, state, and local agencies, tribes, interested organizations, and industry. These partnerships are critical to implementing recovery actions and achieving species recovery goals.

For example, several NMFS programs provide support to our partners to assist with achieving these recovery goals. From 2000 to 2013 the Pacific Coastal Salmon Recovery Fund has provided over \$1 billion in funding to support partnerships in the recovery of listed salmon and steelhead. From 2003 to 2014, the Species Recovery Grants Program, a Section 6 program, has awarded approximately \$42 million to support states and tribal recovery and conservation efforts for other listed species. And from 2001 to 2014, the Prescott Grant program has awarded over \$44 million in funding through 483 competitive and 28 emergency grants to stranding network members to respond and care for stranded marine mammals, many of those listed under the Endangered Species Act.

The National Marine Fisheries Service is dedicated to the stewardship of living marine resources through science-based conservation and management. There are 2,179 species listed under the ESA, and we in NMFS are responsible for 122 of them—from whales and sea turtles to salmon, corals, and Johnson's sea grass. The ESA is a mechanism that helps guide our conservation efforts for these marine species, and reminds us that our children deserve the opportunity to enjoy the same natural world we experience.

We are currently analyzing the six legislative proposals introduced into the House of Representatives regarding the Endangered Species Act, and we would be happy to work cooperatively with you on these draft bills.

Thank you again for the opportunity to discuss implementation of the ESA. I am available to answer questions, of course, if you may have them.

[The prepared statement of Ms. Wieting follows:]

PREPARED STATEMENT OF DONNA WIETING, DIRECTOR, OFFICE OF PROTECTED RESOURCES, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

#### INTRODUCTION

Good morning, Mr. Chairman and members of the committee. Thank you for the opportunity to testify before you today. My name is Donna Wieting and I am the Director of the Office of Protected Resources for the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) in the Department of Commerce. NMFS is dedicated to the stewardship of living marine resources through science-based conservation and management.

The purpose of the ESA is to conserve threatened and endangered species and their ecosystems. Congress passed the ESA on December 28, 1973, recognizing that the natural heritage of the United States was of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people." It was understood that, without protection, many of our Nation's living resources would become extinct. There are 2,180 species listed under the ESA. A species is considered endangered if it is in danger of extinction throughout all or a significant portion of its range. A species is considered threatened if it is likely to become endangered in the foreseeable future. The U.S. Fish and Wildlife Service (USFWS) within the Department of the Interior and NMFS share responsibility for implementing the ESA. NMFS is responsible for 122 marine species, from whales and sea turtles to salmon, corals and Johnson's sea grass.

#### NMFS IMPLEMENTATION OF THE ESA

NMFS conserves and recovers marine resources by doing the following: listing species under the ESA and designating critical habitat (section 4); developing and implementing recovery plans for listed species (section 4); developing cooperative agreements with and providing grants to states for species conservation (section 6); consulting on any Federal agency actions where the agency determines that the action may affect a listed species or its designated critical habitat and to minimize the impacts of incidental take (section 7); partnering with other nations to ensure that international trade does not threaten species (section 8); enforcing against violations of the ESA (sections 9 and 11); cooperating with non-Federal partners to develop conservation plans for the long-term conservation of species (section 10); and authorizing research to learn more about protected species (section 10).

#### *How Species are Listed or Delisted*

Any individual or organization may petition NMFS or USFWS to "list" a species under the ESA. If a petition is received, NMFS or USFWS must determine within 90 days if the petition presents enough information indicating that the listing of the species may be warranted. If the agency finds that the listing of the species may be warranted, it will begin a status review of the species. The agency must, within 1 year of receiving the petition, decide whether to propose the species for listing under the ESA. NMFS may, on its own accord, also initiate a status review to deter-

mine whether to list a species. In that instance, the statutory time frames described above do not apply. The same process applies for delisting species.

NMFS or the USFWS, for their respective species, determine if a species should be listed as endangered or threatened because of any of the following five factors: (1) present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. The ESA requires that listing and delisting decisions be based solely on the best scientific and commercial data available. The Act prohibits the consideration of economic impacts in making species listing decisions. The ESA also requires designation of critical habitat necessary for the conservation of the species; this decision does consider economic impacts.

The listing of a species as endangered makes it illegal to “take” (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to do these things) that species. Similar prohibitions usually extend to threatened species. Federal agencies may be allowed limited take of species through interagency consultations with NMFS or USFWS. Non-Federal individuals, agencies, or organizations may have limited take through special permits with conservation plans. Effects to the listed species must be minimized and in some cases conservation efforts are required to offset the take. NMFS’ Office of Law Enforcement works with the U.S. Coast Guard and other partners to enforce and prosecute ESA violations.

#### *Interagency Consultation and Cooperation*

All Federal agencies are directed, under section 7 of the ESA to utilize their authorities to carry out programs for the conservation of threatened and endangered species. Federal agencies must also consult with NMFS on activities that may affect a listed species or its designated critical habitat. These interagency consultations are designed to assist Federal agencies in fulfilling their duty to ensure Federal actions do not jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat. Biological opinions document NMFS’ opinion as to whether the Federal action is likely to jeopardize the continued existence of listed species or adversely modify their designated critical habitat. Where appropriate, biological opinions provide an exemption for the “take” of listed species while specifying the extent of take allowed, the Reasonable and Prudent Measures necessary to minimize impacts from the Federal action, and the Terms and Conditions with which the action agency must comply. Should an action be determined to jeopardize a species or adversely modify critical habitat, NMFS will suggest Reasonable and Prudent Alternatives, which are alternative methods of project implementation that would avoid the likelihood of jeopardy to the species or adverse modification of critical habitat. Nationally, NMFS conducts approximately 1,200 ESA consultations per year.

#### SPECIES RECOVERY

Recovery of threatened and endangered species is a complex and challenging process, but one which also offers long-term benefits to the health of our environment and our communities. Actions to achieve a species’ recovery may require restoring or preserving habitat, minimizing or offsetting effects of actions that harm species, enhancing population numbers, or a combination of all of these actions. Many of these actions also help to provide communities with healthier ecosystems, cleaner water, and greater opportunities for recreation, both now and in future generations.

Partnerships with a variety of stakeholders, including private citizens, Federal, state and local agencies, tribes, interested organizations, and industry, are critical to implementing recovery actions and achieving species recovery goals. Several NMFS programs, including the Species Recovery Grants to states and tribes and the Pacific Coastal Salmon Recovery Fund, and the Prescott Marine Mammal Rescue Assistance Grant Program provide support to our partners to assist with achieving recovery goals. From 2000–2013 the Pacific Coastal Salmon Recovery Fund has provided \$1.09 billion in funding to support partnerships in the recovery of listed salmon and steelhead. From 2003–2014 the Species Recovery Grants Program has awarded approximately \$42 million to support state and tribal recovery and conservation efforts for other listed species. From 2001–2014 the Prescott Program awarded over \$44.8 million in funding through 483 competitive and 28 emergency grants to Stranding Network members to respond and care for stranded marine mammals.

## ENDANGERED SPECIES ACT SUCSESSES

The ESA has been successful in preventing species extinction—less than 1 percent of the species listed have gone extinct. Despite the fact that species reductions occurred over often very long time periods, in its 40 year existence, the ESA has helped recover over 30 species. NMFS recently delisted the Eastern population of Steller sea lion, our first delisting since 1994 when NMFS delisted the now thriving eastern population of Pacific gray whales. Between October 1, 2010, and September 30, 2012, of the 70 domestic endangered or threatened marine species listed under the ESA, 27 (39 percent) were stabilized or improving, 16 (23 percent) were known to be declining, 6 (8 percent) were mixed, with their status varying by population location, and 21 (30 percent) were unknown, because we lacked sufficient data to make a determination.

In addition to Pacific gray whales and Eastern Steller sea lions, ESA recovery actions have stabilized or improved the downward population trend of many marine species. For example, listed humpback populations are currently growing by 3–7 percent annually. In 2013, we saw record returns of nearly 820,000 adult fall Chinook salmon passing the Bonneville Dam on their way up the Columbia River to spawn. This is the most fall Chinook salmon to pass the dam in a single year since the dam was completed in 1938, and more than twice the 10-year average of approximately 390,000. A substantial number of Hawaiian monk seals are alive today because of direct interventions by the NMFS Recovery Program. Because of these efforts directed at monk seals, the population is 30 percent larger than if we had not acted, offering hope for future recovery and assurance our actions are making a difference. We face continuing challenges in recovering numerous other species. Declines in habitat in coastal areas from wetlands to coral reefs is often a major causative factor. As stresses on coastal ecosystems increase, it is important to place a priority on habitat protection and restoration in order to prevent listings and facilitate recovery and delisting.

## PENDING LEGISLATIVE PROPOSALS

NMFS is currently analyzing the six legislative proposals that were recently introduced into the House of Representatives: H.R. 1314, to amend the Endangered Species Act of 1973 to establish a procedure for approval of certain settlements; H.R. 1927, the More Water and Security for Californians Act; H.R. 4256, the Endangered Species Improvement Act of 2014; H.R. 4284, the ESA Improvement Act of 2014; H.R. 4319, the Common Sense in Species Protection Act of 2014; and H.R. 4866, the Lesser Prairie Chicken Voluntary Recovery Act of 2014.

## CONCLUSION

Extinctions are currently occurring at a rate that is unprecedented in human history. Each plant, animal, and their physical environment is part of a much more complex web of life. Because of this, the extinction of a single species can cause a series of negative events to occur that affect many other species. Endangered species also serve as “sentinel” species to indicate larger ecological problems that could affect the functioning of the ecosystem and likely humans as well. As importantly, species diversity is part of the natural legacy we leave for future generations. The wide variety of species on land and in our ocean has provided inspiration, beauty, solace, food, livelihood and economic benefit, medicines and other products for previous generations. The ESA is a mechanism to help guide conservation efforts, and to remind us that our children deserve the opportunity to enjoy the same natural world we experience.

Thank you again for the opportunity to discuss implementation of the Endangered Species Act. We would be happy to work cooperatively with the committee on these draft bills and would welcome the opportunity to discuss the legislation in more detail. I am available to answer any questions you may have.

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Mr. MULLIN. Thank you so much. The Chair will now recognize Mr.—oh, sorry, Mr. Birmingham—

Mr. COSTA. Mr. Chairman, for the introduction?

Mr. MULLIN. Oh, Mr. Costa, you may introduce your guest.

Mr. COSTA. Witness. Thank you very much, Mr. Chairman, and to the panel members.

Mr. Tom Birmingham is the General Manager of Westlands Irrigation District, which I have represented over the years, both in the State legislature and in Congress. He is well respected among water managers throughout the State of California for his focus, his tenacity, his problem-solving, and his legal knowledge of water law in California, which is complex, as we all know.

A graduate of UCLA and McGeorge School of Law, I can tell you that I know he is an avid supporter of the environment, personally. His passions are fishing and hunting, and I know that he wants to ensure that there is sustainability of all the species, as we look forward to the next generation of Californians, as we try to plan under difficult, difficult circumstances our water needs in California.

So, I am pleased to have invited Mr. Birmingham to be a witness on this panel.

Mr. BIRMINGHAM. Thank you.

Mr. MULLIN. Thank you.

**STATEMENT OF THOMAS W. BIRMINGHAM, GENERAL  
MANAGER/GENERAL COUNSEL, WESTLANDS WATER  
DISTRICT, FRESNO, CALIFORNIA**

Mr. BIRMINGHAM. Mr. Chairman and members of the committee, good afternoon. I will attempt to summarize my testimony as briefly as possible.

As the committee is aware from prior hearings, biological opinions adopted by the Fish and Wildlife Service and NOAA Fisheries have devastated the water supply that sustains the agricultural economy of the San Joaquin Valley. In some years, those biological opinions reduce water for the people who receive water from the Central Valley Project and the State Water Project by more than a million acre-feet. And in those years, the biological opinions reduce flow to water that used to go to our farms and to our cities by as much as one-third.

I say "people" who receive water from the Central Valley Project and the State Water Project, because it is people who are suffering the consequences of chronic water supply shortages. It is accurate to describe acreage that will be fallowed because of water supply shortages, but that does not begin to tell the real story.

The real story is about once vibrant rural communities that are today literally drying up and blowing away. The real story is about small businesses that are barely surviving or, worse, failing. The real story is about thousands of hard-working farm workers who have lost their jobs because farmers do not have sufficient water to irrigate their land. And people who have lost their jobs in small businesses because those farmers don't need new trucks, tractors, tires, or fertilizer. And, most tragically, the real story is about families who do not have enough to eat, people who today have to stand in food lines to put food on their own tables. And, ironically, it is these people who would otherwise be growing food to feed the Nation.

Many members of the committee have seen for themselves the consequences of the implementation of these biological opinions while visiting the San Joaquin Valley. Mr. Costa sees these consequences every week that he returns to his district. And I suspect

it is having seen those consequences that have motivated him to introduce H.R. 1927. But for members of the committee who have not witnessed these consequences, I encourage you to go to Mendota, Firebaugh, or Huron, walk up to any house, and simply go in and ask to look in their refrigerators.

I realize this sounds like hyperbole, but there is human suffering in these small towns, suffering which never could have been imagined in 1973, when Congress enacted the Endangered Species Act. H.R. 1927 would begin to address this human suffering. But I would like to start by talking about what H.R. 1927 will not do.

I want to emphasize H.R. 1927—

Mr. MULLIN. Can the gentleman please explain the map up here?

Mr. BIRMINGHAM. Yes, Mr. Chairman. Actually, it is a satellite photo taken in July of 2014 of the area on the west side of the San Joaquin Valley served by Westlands Water District. And what is depicted in that satellite photo are the areas that have been fallowed, the lighter colored areas, including the light green areas, and those areas that remain in production in 2014 with irrigation coming primarily this year from groundwater.

But again, I would like to go back and talk about H.R. 18—I am sorry, 1927, in the context of what it will not do. H.R. 1927 will not suspend the Endangered Species Act. H.R. 1927 will not undermine the scientific basis for the biological opinions. Rather, H.R. 1927 will limit water supply losses to what is actually prescribed in the biological opinions so that these losses are not more severe than they need to be.

H.R. 1927 will prevent restrictions on reverse flow on Old and Middle River that exceed what past experience and science has shown to be effective. And H.R. 1927 will protect our water supplies from the Federal regulators' own experiments that may waste water when water is in short supply.

Like other bills considered by this committee and this Congress and the last Congress, Westlands supports H.R. 1927, because it will restore some semblance of balance to the allocation of water in California between people and the environment.

Thank you, and I would be happy to entertain any questions.

[The prepared statement of Mr. Birmingham follows:]

PREPARED STATEMENT OF THOMAS W. BIRMINGHAM, GENERAL MANAGER,  
WESTLANDS WATER DISTRICT ON H.R. 1927

Mr. Chairman and members of the committee, my name is Thomas W. Birmingham, and I am the General Manager of Westlands Water District ("Westlands" or "District"). Thank you for the opportunity to appear before you today to testify today on H.R. 1927, the "More Water and Security for Californians Act." This legislation would provide congressional direction concerning implementation of the Endangered Species Act ("ESA") as it pertains to the operations of the Central Valley Project ("CVP") and the California State Water Project ("SWP"). Enactment of H.R. 1927 would restore balance and flexibility to operations of the CVP and SWP, thereby restoring water supply and water supply reliability and creating thousands of jobs in one of the most economically depressed regions of the country.

As I have previously testified before the Subcommittee on Water and Power, Westlands is a California water district that serves irrigation water to an area of approximately 600,000 acres on the west side of the San Joaquin Valley in Fresno and Kings counties. The District averages 15 miles in width and is 70 miles long. Historically, the demand for irrigation water in Westlands was 1.4 million acre-feet per year, and that demand has been satisfied through the use of groundwater, water made available to the District from the Central Valley Project under contracts with

the United States for the delivery of 1.19 million acre-feet, and annual transfers of water from other water agencies.

Westlands is one of the most fertile, productive and diversified farming regions in the Nation. Rich soil, a good climate, and innovative farm management have helped make the area served by Westlands one of the most productive farming areas in the San Joaquin Valley and the Nation. Westlands farmers produce over 50 commercial fiber and food crops sold for the fresh, dry, and canned or frozen food markets; domestic and export. These crops have a value in excess of \$1 billion, and they are an important factor in ensuring that American families will continue to enjoy a food supply that is abundant, safe, and affordable. However, like most regions of the arid West, the production of these crops depends on the availability of water for irrigation.

Prior to the application of the ESA to operations of the CVP in approximately 1992, the principal source of irrigation water for farmers in the District was water made available from the CVP under contracts with the United States. This source of water was highly dependable, and in all but the most critically dry years, it was adequate to meet the total demand for irrigation water in the District.

The ESA dramatically changed the reliability and adequacy of the CVP as a source of water. Reductions in water supply under ESA have steadily increased, becoming progressively more and more damaging. South-of-Delta CVP irrigation water service contractors, like Westlands, have gone from an average supply of 92 percent of the contract quantities in 1992 to 35–40 percent today. For Westlands, this represents an average loss of approximately 675,000 acre-feet of water on an annual basis; for all south-of-Delta CVP irrigation water service contractors this represents a loss of approximately 1.1 million acre-feet. And the price paid for those losses is measured in lost jobs, diminished productivity, and higher costs of food production.

The legislation authored by Representative Jim Costa, H.R. 1927, addresses one of the root causes of water supply shortages that affect not just farmers in the San Joaquin Valley, but people who live and work in vast regions of California, including the San Joaquin Valley, the Silicon Valley, the central coast, and southern California. H.R. 1927 provides well-thought-out direction on how the ESA will be applied to the CVP and the SWP. If H.R. 1927 were enacted, it would significantly increase water supply for the benefit workers, farmers, and consumers alike. And it would do so while providing significant protections for listed fish species that are consistent with prior actions to prevent CVP and SWP operations from causing jeopardy to those species or harming their critical habitat.

#### APPLICATION OF THE ENDANGERED SPECIES ACT TO THE CVP AND SWP

The CVP and the SWP, operated respectively by the Bureau of Reclamation (“Reclamation”) and the California Department of Water Resources (“DWR”), are perhaps the two largest and most important water projects in the United States. These projects supply water originating in northern California to more than 20,000,000 agricultural and domestic consumers in central and southern California. In 2008, Reclamation initiated consultations under section 7 of the ESA with the U.S. Fish and Wildlife Service (“FWS”) and NOAA Fisheries, an agency within the Department of Commerce, on whether the coordinated operations of the CVP and SWP would jeopardize the fish species listed under the ESA. In lengthy biological opinions, the FWS and NOAA Fisheries concluded that the CVP and SWP operations would jeopardize the Delta smelt, winter run Chinook salmon, San Joaquin River steelhead, and other listed species. As required by the ESA, the FWS and NOAA Fisheries issued biological opinions, respectively on December 15, 2008, and on June 4, 2009, that prescribed “reasonable and prudent alternatives” that Reclamation and DWR should implement to ameliorate the effects on the listed species and their critical habitat.

The reasonable and prudent alternatives prescribed by 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion reduce the water that may be diverted or re-diverted by CVP and SWP pumping plants situated in the southern Delta for delivery to central and southern California. *Inter alia*, the reasonable and prudent alternatives, during the period from December 1 through June 30, limit pumping rates to restrict reverse flow in Old and Middle Rivers to rates ranging from –1250 cubic feet per second to –5000 cubic feet per second, and during the period from April 1 through May 30, the 2009 NOAA Fisheries biological opinion imposes an inflow/export ratio, which limits pumping rates to a percentage of flow measured in the San Joaquin River at Vernalis. The water supply reductions resulting from these reasonable and prudent alternatives can be enormous.

It is estimated that during the period from December 1, 2012 through February 28, 2013, restrictions on reverse flow in Old and Middle Rivers imposed by the bio-

logical opinions resulted in a combined water loss for the CVP and SWP of more than 815,000 acre-feet, compared to operations under prior biological opinions issued in 2004 and 2005. As it turned out, calendar year 2013 was the driest year in California's recorded history, and according to Reclamation's records, the CVP and SWP were able to pump only 4,190,000 acre-feet. In other words, the loss of 815,000 acre-feet reduced exports by nearly 20 percent, and the loss of this water provided no apparent benefit for Delta smelt. The 2013 fall abundance index for this species was the second lowest number, 18, since record keeping began in 1967. The lowest number, 17, was recorded in 2009, another year in which pumping was limited to restrict reverse flow in Old and Middle Rivers for the purported protection of Delta smelt.

Water supply losses resulting from the April–May I/E ratio can also be significant. In 2010, when the I/E ratio limited pumping to rates equivalent to one-quarter of flow measured at Vernalis, it is estimated that the loss to the CVP and SWP was 351,000 acre-feet, compared to project operations under the 2004 and 2005 biological opinions. This loss reduced exports by 7.5 percent. When combined with losses resulting from limits on pumping to restrict reverse flow in Old and Middle Rivers, 1,043,000, the loss of 351,000 acre-feet, means that the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion reduced exports in 2010 by 30 percent.

Enactment of H.R. 1927 would ameliorate the water supply losses resulting from the implementation of the reasonable and prudent alternatives prescribed by the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion. H.R. 1927 provides the requirements of the ESA relating to operations of the CVP and SWP are deemed satisfied if the projects are operated pursuant to the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion. It also provides, however, that neither biological opinion shall restrict flow in Old and Middle Rivers to a 14-day average of the mean daily flow to achieve flow less negative than –5,000 cubic feet per second. Under H.R. 1927, the 2009 NOAA Fisheries biological opinion could not be implemented to impose an April–May I/E ratio except as required to implement California State Water Resources Control Board Water Rights Decision 1641 or a superseding water rights decision. And finally, H.R. 1927 would limit application of the  $\times 2$  requirements in the 2008 FWS biological opinion to only those circumstances where the action would not diminish the capability of either the CVP or SWP to make water available for other authorized project purposes.

It is important to note that H.R. 1927 would modify, not eliminate, actions prescribed by the reasonable and prudent alternatives described in by the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion. Moreover, there is a scientific basis for these modifications. On March 19, 2010, the National Research Council of the National Academies issued a report entitled “A Scientific Assessment of Alternatives for Reducing Water Management Effects On Threatened and Endangered Fishes in California's Bay-Delta,” (“NRC Report”) in which the NRC evaluated the scientific basis for the reasonable and prudent alternatives prescribed by the biological opinions. With respect to restricting reverse flow in the Old and Middle Rivers to protect Delta smelt, the reported stated it was “scientifically reasonable to conclude that high negative OMR flows in winter probably adversely affect smelt,” but “the available data do not permit a confident identification of the threshold values to use in the action, and they do not permit a confident assessment of the benefits to the population of the action.” NRC Report at 51. In addition, the NRC observed, “[t]he historical distribution of smelt on which the relationship with OMR flows was established no longer exists. Delta smelt are now sparsely distributed in the central and southern delta . . . , and pump salvage also has been extremely low, less than 4 percent of the 50-year average index.” NRC Report at 50. H.R. 1927 would maintain some limits on pumping to restrict reverse flow in Old and Middle Rivers, but at the upper end of the range prescribed by the biological opinion, –5000 cubic feet per second. This is consistent with scientific analysis that at flows less negative than –5500 cubic feet per second, there is simply no relationship between flow and the salvage rate of Delta smelt.

With respect to the April–May I/E ratio, the NRC Report stated that “increasing San Joaquin River flows has a stronger foundation than the prescribed action of concurrently managing inflows and exports,” and there is a “weak influence of exports in all survival relationships . . . .” NRC Report at 60, 59. The NRC Report concluded export pumping rates could be increased “without great risk to steelhead.” NRC Report at 60. The direction in H.R. 1927 that the 2009 NOAA Fisheries biological opinion not be implemented to impose an April–May I/E ratio except as required to implement California State Water Resources Control Board Water Rights Decision 1641 or a superseding water rights decision would be consistent with this conclusion, while still providing a 1:1 inflow/export ratio for a 30-day period from

mid-April through mid-May for protection of anadromous species out-migrating from the San Joaquin River.

The fall  $\times 2$  requirements in the 2008 FWS biological opinion are in essence an experiment.<sup>1</sup> The NRC Report also examined the basis for these requirements and stated:

The controversy about [Action 4 of the FWS RPA] arises from the poor and sometimes confounding relationship between indirect measures of delta smelt populations (indices) and  $\times 2$ . The weak statistical relationship between the location of  $\times 2$  and the size of smelt populations makes the justification for this action difficult to understand.

NRC Report at 53. H.R. 1927 would not prevent implementation of this  $\times 2$  experiment, but it would prevent the experiment from being conducted if it would diminish the capability of either the CVP or SWP to make water available for other authorized project purposes. This provision of H.R. 1927 would also eliminate the potential for the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion to impose conflicting requirements on operations of the CVP and SWP. The 2008 FWS biological opinion requires that during September and October in years when the preceding precipitation and runoff period was wet or above normal, the monthly average of  $\times 2$  be no more eastward than 74 km from the Golden Gate. It is estimated that this action would require that the CVP and SWP release 800,000 acre-feet of water to comply with this requirement. However, the 2009 NOAA Fisheries biological opinion provides that the CVP maintain in storage specified quantities of water to protect cold water for the propagation of salmonid species below CVP dams. There is great potential that the fall  $\times 2$  requirements of the 2008 FWS biological opinion could result in the CVP's inability to maintain water in storage to protect cold water pools, and H.R. 1927 would eliminate that potential.

#### NEED FOR CONGRESSIONAL ACTION

The socio-economic impacts of water supply shortages resulting from implementation of the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion in the San Joaquin Valley have been profound. In 2009, a dry year, the allocation of water for south-of-Delta CVP agricultural water service contractors was only 10 percent. This allocation compares to allocations in other recent dry years, before implementation of the biological opinions, 2001, 2002, and 2007, when the allocations were 49 percent, 70 percent, and 50 percent, respectively. In 2009, nearly half of the irrigable lands in Westlands were fallowed, and large areas of other agricultural water districts were also fallowed. The most tragic consequence of the 2009 crisis was that thousands of people who live and work on the westside of the San Joaquin Valley lost their jobs; unemployment rates in the city of Mendota and the city of San Joaquin soared to more than 40 percent. Small, local businesses were plunged into an economic crisis. And tragically, many people went hungry. Indeed, long food lines in small, disadvantaged rural communities on the westside of the San Joaquin Valley were a common sight.

Oliver Wanger, a former U.S. District Judge to whom numerous ESA cases involving the CVP and SWP were assigned, has observed on numerous occasions that it is up to Congress to determine how the ESA should be applied to these two major water projects. Recently, in *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014), the U.S. Court of Appeals for the Ninth Circuit upheld the lawfulness of the 2008 FWS biological opinion. In doing so, the court stated that it was "acutely aware of the consequences" and "recognize[d] the enormous practical implications of [its] decision." *Id.* at 592, 593. But the consequences were prescribed by Congress and that resolution of "'fundamental policy questions' about the allocation of water resources in California 'lies . . . with Congress . . .'" *Id.* at 593.

Enactment of H.R. 1927 would provide the congressional direction that Judge Wanger called for and would be an expression by Congress on the fundamental policy question that the Ninth Circuit stated lies with Congress. Stated succinctly, if Congress does not concur with the consequences imposed on California, indeed the

<sup>1</sup> The 2008 FWS biological opinion states: "The Service shall conduct a comprehensive review of the outcomes of the Action and the effectiveness of the adaptive management program 10 years from the signing of the biological opinion, or sooner if circumstances warrant. This review shall entail an independent peer review of the Action. The purposes of the review shall be to evaluate the overall benefits of the Action and to evaluate the effectiveness of the adaptive management program. At the end of 10 years or sooner, this action, based on the peer review and Service determination as to its efficacy shall either be continued, modified or terminated." 2008 FWS biological opinion at 283.

Nation, as a result of the application of the ESA to the CVP and SWP, it is up to Congress to change those consequences.

#### CONCLUSION

I want to express Westlands' support for the efforts of Representative Costa, as well as Representatives Devin Nunes, Kevin McCarthy, Jeff Denham, David Valadao and other members, to provide important congressional direction concerning application of the ESA to operations of the CVP and SWP. I also want to express Westlands' strong support for H.R. 1927. I would welcome any questions from members of the subcommittee.

Mr. MULLIN. I will now recognize the Ranking Member for any questions they may have. Oh, I can go—I am not used to going first.

[Laughter.]

Mr. MULLIN. So, Mr. Costa, I am going to go first.

Mr. COSTA. You are first.

Mr. MULLIN. This is new. Wow, I am Chairman now. I've got the gavel.

Mr. Li, I would like to visit with you just a second. I understand you are Defender of Wildlife, based here in Washington, DC. Is that correct?

Mr. LI. Correct.

Mr. MULLIN. Do you live here, in Washington, DC?

Mr. LI. I do.

Mr. MULLIN. Have you always lived in Washington, DC?

Mr. LI. I have not. I grew up in New York.

Mr. MULLIN. So, in the city?

Mr. LI. In the city, correct.

Mr. MULLIN. All right. And you are going to try telling me how the lesser prairie chicken needs to be raised right? Because that would be like me trying to tell you how to run a taxi or something, because we don't have those in Oklahoma, not where I am from, but I understand you have a lot of them in New York. Is that correct?

Mr. LI. We do have chickens in New York. Not lesser prairie chickens.

Mr. MULLIN. Sure. I understand what you are saying. But what you are saying is that you are basing everything, all your decisions, based on science, and you have never lived in the environment. You have lived in New York City, you lived in Washington, DC, and you are going to come to the five states that are affected by the lesser prairie chicken and say that science outruns what we actually know is happening.

Have you been there during a severe drought?

Mr. LI. You don't have to—

Mr. MULLIN. No, sir. Have you been there—have you been to Kansas, have you been to Oklahoma?

Mr. LI. I have not, personally.

Mr. MULLIN. And so you are saying that it all has to do with science. It would amaze you that things could even live in the severe drought we have had in this area. And you are saying that it is based on science that we don't care about the lesser prairie chicken, because the guy from New York and Washington, DC cares more about it than we do.

Mr. LI. I didn't—

Mr. MULLIN. Sir, you are sadly mistaken. And I take a little bit of offense to somebody that is from New York or from Washington trying to tell me what the best habitat is for a lesser prairie chicken, when I have lived there my entire life. No offense, sir, but talk about things that you actually have dealt with firsthand, not things that you just studied in the lab.

Secretary Jennison, we have worked closely with your state and the other states around us with the lesser prairie chicken. Could you kind of tell me some things that the state has done with the other five states to help improve the habitat for the lesser prairie chicken?

Mr. JENNISON. Well, certainly. There are a variety of things that have been done over the last number of years. And some of them, to give credit where credit is due, USDA—some of the programs, CRP in particular, has been a great thing for the prairie chicken, the lesser prairie chicken initiative. But most recently, the states came together in the range to form the range-wide plan. And I would say that they work very closely with U.S. Fish and Wildlife.

I would also say, had we been on our own, it would have looked different. I don't think it would have had quite the impact to industry that this one could have. But, even giving that, the range-wide plan was developed. And while the U.S. Fish and Wildlife never said to anyone, "If you guys do this we are not going to list it," we certainly were working under that assessment, that if we could do a good job of the states coming together, putting something together that they agreed to, that we could avoid a listing.

I think it was a big mistake on the part of U.S. Fish and Wildlife at that point, when they listed, because I do think that we had a mechanism for a new generation of conservation in this country to go forward without the heavy-handed regulation that we are seeing.

Mr. MULLIN. What have you heard from the landowners and the industry that not only participated, but actually ponied up the \$42 million to help with this project?

Mr. JENNISON. I think the problem that we see—and it is this way with everything, to bring up another issue, water—when things like this happen, the opportunity or the potential that people are going to volunteer—in Kansas, where we have 97 percent of our grounds in private hands, what we have done for natural resources and wildlife management in the State of Kansas depends a good deal with volunteers that own that private ground. And when things like this are happening, they are less likely to volunteer.

Mr. MULLIN. Thank you. Thank you for your testimony. I yield back the rest of my time, and the Chair will now recognize the Ranking Member, Mr. Costa.

Mr. COSTA. Thank you very much, Mr. Chairman. I would like the staff to put on the monitor the next slide that I think exemplifies the drought conditions we are facing in California.

[Slide]

Mr. COSTA. And, clearly, three consecutive dry years is a large part of the problem. But we have a broken water system in California, and we have had this for years, a water system de-

signed for 18, 20 million people. Today we have 38 million people. By the year 2030, we will have over 50 million people. And the whole sustainability of the state and sustainability of our urban centers, as well as our agricultural areas is at risk.

In the last 3 years, they have been the driest in recorded history; Governor Brown has declared a statewide drought emergency. But for more than 20 years the National Marine Fisheries and the U.S. Fish and Wildlife, managing the protection of smelt and salmon and species recovery, sadly, has not progressed. Despite billions of dollars being spent by public agencies and the taxpayers, it is sadly in a state of decline. And after more than 7 years of regulating the Central Valley Project, State Water Project, under biological conditions, the species have continued to deteriorate.

So, clearly, there are multiple factors that are a result of this decline. And it is estimated that the export of water, which one of my colleagues spoke of earlier, is about 8 percent of the cause of the decline of the fisheries.

Notwithstanding that fact, it is satisfactory—it is not satisfactory to say that we can and we must do better. But we have to focus on the improvement and the current science, if we are going to do so. Currently, we can't lose sight of the fact that people throughout California have been impacted, and a lot of folks have been working hard. But we have 25 million people and 3 million acres of the Nation's most productive agricultural land that has gotten a zero—zero—water supply under the Federal projects. And next year, if we have an average rainfall, operating under the current requirements, water districts in the San Joaquin Valley will still have a zero allocation.

There are homes and schools whose wells are literally drying up in every region of California. That is a result of the drought. But can we make our water system work more efficiently and effectively? Of course we can.

Can we increase our water supply? Of course we can. That is why Governor Brown and the State legislature last month passed a \$7.1 billion water bond measure—we hope the voters will approve it in November—of which \$2.7 billion is for additional new water storage and supply. It passed the legislature overwhelmingly on a bipartisan basis, 37 to 0 in the State Senate, and 77 to 2 in the Assembly.

But people are wondering: Are we in Congress capable of coming together and providing solutions? We owe them hope to restore the fact that the American Dream still lives on in California, and that we can solve these problems. Clearly, the Governor and the legislature think they can. And it is incumbent upon us to do that, as well.

The President himself traveled to the Valley to witness firsthand the devastation about the effect of the drought in California, and said that the effect of the drought, and I quote, "California is our biggest economy. California is our biggest agricultural producer. So what happens here matters to every working American, right down to the cost of the food that you put on your table." End of quote.

Even the 9th Circuit, in its most recent ruling of upholding the legality of the biological opinions, acknowledged that there are serious flaws in the opinions. But the court said it is up to Congress.

It is up to Congress to set the policy for the operation of these water projects. And therein lies the dilemma.

There are many different ideas on how to operate these projects in a way that provides a better balance. My legislation is but one of those ideas. What is important, though, is that we act, and that we act now, so that the flexibility can be in place, so that whatever rain comes next year, at the end of the day common sense will prevail. And, hopefully, we can do this on a bipartisan basis, because it is the only way we will get anything done.

Now, let me ask a question here of Mr. Birmingham. In your written testimony you indicate that there has been significant negative impacts on the ability of California's water system to move water since the biological opinions were put in place—actually, that were part of the previous administration. I have read reports that indicate that there is an above-average chance of an El Nino effect next year that may bring average or above-average rainfall to California. What would that result in, a water supply, in the Valley?

Mr. BIRMINGHAM. If it begins to rain in the—

Mr. COSTA. And we pray it does.

Mr. BIRMINGHAM. And we pray it does. But if it begins to rain in November, December, January, February, we have average precipitation in the State of California, the allocation for south of Delta Central Valley Project Water Service contractors next year will be zero. It may improve, as the year goes along, if precipitation goes along.

But if we have an average water year next year, in terms of hydrology and runoff, the allocation for south of Delta Central Valley Project Agricultural Service contractors will start at zero and will likely remain at zero. The drought will be over, but we still will have no water supply.

Mr. COSTA. As it relates to the Endangered Species Act, there are improvements that can be made to help species recovery. What would you suggest would be a more common-sense way to approach this?

Mr. BIRMINGHAM. Well, to develop a comprehensive method, or a comprehensive program of looking at all of the factors that limit the abundance of the species. To date, the focus of protecting species that are at risk in the Sacramento/San Joaquin Delta has been to limit the operations of the water projects. Yet we have ignored many other factors that limit the abundance of these species.

If we are serious about recovering the species, then we need to develop a program that would begin to look comprehensively, and address all of the factors that limit the abundance of those species.

Mr. COSTA. Thank you. My time—

Mr. MCCLINTOCK [presiding]. As much as it pains me to interrupt, Mr. Costa, you had an extra minute-and-a-half, because the timer didn't start until then. So I am going to have to call time on you. But perhaps we can go to a second round later, if there is time, and—

Mr. COSTA. Well, if there is a second round—

Mr. MCCLINTOCK. But I will pick up where you left off, by pointing out that the opposition to the reforms that are presented to the

committee today seem to set up a straw man that doesn't exist, and attributes to that straw man a position that nobody has taken.

Let me make it very clear: no one has suggested that the ESA does not serve a vital cause, and that is to assure that no species goes extinct because of human activity. But, as Eric Hoffer said, "Every great cause begins as a movement, becomes a business, and eventually degenerates into a racket." And, as I look at the long list of litigation that one of our witnesses—organizations has been involved in, you see exactly what Mr. Hoffer means by a racket.

Tom Barcellos, on behalf of the Friant Water District, has submitted written testimony to the committee which I think sums up the situation rather clearly when he writes, "The unprecedented lack of surface water deliveries from the Central Valley Project is only partly due to drought conditions. It is in large part the result of regulatory and policy decisions by Federal agencies charged with enforcing the Endangered Species Act. These agencies are accountable to no one, are not required to consider the consequences of their decisions on human uses, and appear to be motivated mainly by a desire to avoid being sued by environmental organizations that don't believe they are enforcing the ESA with sufficient vigor. As a result, these agencies have the absolute, unassailable authority to make bad decisions that have a direct effect on the water supplies and well-being of millions of Californians. The agencies are free to curtail vital water deliveries from the Sacramento/San Joaquin Delta using outdated science, questionable standards, and admittedly, poor knowledge of the actual condition and location of protected fish species."

I will ask at this point unanimous consent to include his statement in the committee record.

[No response.]

Mr. MCCLINTOCK. Without objection.

[The testimony of Mr. Barcellos, submitted by Mr. McClintock for the record, follows:]

PREPARED STATEMENT OF TOM BARCELLOS, ON BEHALF OF BARCELLOS FARMS, LOWER TULE RIVER IRRIGATION DISTRICT AND THE FRIANT WATER AUTHORITY ON H.R. 1927

Chairman Hastings, Ranking Member DeFazio and members of the committee, thank you for the opportunity to appear before you today to testify in support of H.R. 1927, the More Water and Security for Californians Act. My name is Tom Barcellos, and I am a family dairy farmer from Tipton, California, on the east side of the San Joaquin Valley. I serve on the board of directors for the Lower Tule River Irrigation District, which is a member of the Friant Water Authority. I represent both of those organizations here today.

Lower Tule River Irrigation District and the other member-agencies of the Friant Water Authority are served by the Friant Division of the Central Valley Project (CVP), which diverts water from the San Joaquin River at Friant Dam in the Sierra foothills and delivers it via the Friant-Kern and Madera Canals to more than 15,000 farms on about 1 million acres in the San Joaquin Valley. Historically, Friant water users receive an average of 1.2 million acre-feet annually from the CVP. The Friant Division is a conjunctive-use project, meaning that it is designed to store surface water supplies in groundwater aquifers during good years so that water can be available to farmers and communities during dry years.

This year, for the first time in its 62-year history, the CVP delivered no water to Friant Division farms and communities. As a result, farmers on east side of the San Joaquin Valley have turned to their groundwater—where it's available—to sustain their dairies and keep their high-value citrus, fruit and nut trees alive. But we began 2014 with groundwater supplies already reduced by unusually dry condi-

tions in 2012 and 2013, and as the summer of 2014 comes to a close, groundwater levels are dangerously low.

The unprecedented lack of surface water deliveries from the CVP is only partly due to drought conditions. It is in large part the result of regulatory and policy decisions by Federal agencies charged with enforcing the Endangered Species Act (ESA). These agencies are accountable to no one, are not required to consider the consequences of their decisions on human uses, and appear to be motivated mainly by a desire to avoid being sued by environmental organizations that don't believe they are enforcing the ESA with sufficient vigor.

As a result, these agencies have the absolute, unassailable authority to make bad decisions that have a direct effect on the water supplies and well-being of millions of Californians. The agencies are free to curtail vital water deliveries from the Sacramento-San Joaquin Delta using outdated science, questionable standards, and an admittedly poor knowledge of the actual condition and location of protected fish species.

The water supply crisis of 2014 has made it plain that the Federal fishery agencies are unwilling or incapable of making reasonable, balanced decisions when it comes to applying the ESA in the Delta. Congress wrote the law; it's time for Congress to provide clear direction on how it should be carried out. H.R. 1927 and the other bills before the committee today, as well as drought legislation (H.R. 3964) passed by the House earlier this year, provide that badly needed direction. I acknowledge that there may be other ways to address the problem, but the problem needs to be addressed. Now. Immediately.

Without any water from CVP this year, the situation in the east side of the Valley is dire. Groundwater, even in the best of times, is just not sufficient to sustain the whole Valley. The impacts of the policy decision not to provide any CVP water to the Friant Division are being felt throughout the Valley, and not just by agriculture. There is no aspect of life in the Valley that has not been touched by this. Everyone and everything depends on water. 2014 has been a disaster. If nothing changes, 2015 will be a catastrophe.

Within the Friant service area, and throughout the east side of the Valley, domestic wells are going dry. Some people have had to move out of their homes. Others are having emergency water supplies brought in. A lot of temporary tanks are being placed for individual homeowners. Who knows what the source of that water is? But people are understandably desperate. Some homes have been out of water for weeks or even months.

My own son-in-law came home one night and found they didn't have water at their home. The groundwater level had gone below the depth of the pump. We were fortunate enough that a couple of days later, they were able to lower the well. Other people don't have the wherewithal to lower their wells, or there is nothing left to tap into. One of my son-in-law's neighbors saw he was lowering the well, and she indicated that she had been out of water for 3 months. Her son had been bringing her water 50 gallons at a time.

In addition to my position as a board member on the Lower Tule River Irrigation District, I also sit on the board of the Pleasant View School District. We have a grammar school that serves 565 children that is entirely dependent on a well for its water service. We have been monitoring the water level in that well since mid-year. In June and July, the water level was dropping at about 1 foot per week. Now that school is back in session, we have to draw from that well to serve the students. Currently, we have 17 feet of water left before we hit bottom. Nearly 100 percent of the students at this school are on the free or reduced lunch program, and we need the kitchen to have water to be able to prepare food safely so these children can get fed. By the first of the year, if we don't get any other water supply, we are going to be in a lot of trouble. This is not an isolated situation. The same thing is going on with Rockford School, and I have heard of other schools in other parts of the Friant service area, from Madera to Delano. In fact, the Tulare County Superintendent of Schools has noted his growing concern with this situation. (See attached August 11, 2014 letter from Jim Vidak, Tulare County Superintendent of Schools.) Schools and their surrounding communities and residents cannot just go without water.

These schools aren't served by Friant water directly. But the fastest way to boost the groundwater levels in these areas is to deliver water to the Friant irrigation districts, and institute full use of their recharge basins so the groundwater can recover. If we don't get a Friant water supply this year, these areas will be left without any access to water at all next year.

Obviously, the California drought is having serious impacts on the businesses and economy of the San Joaquin Valley. This year, I have 300 acres fallowed, which normally would be planted. That leaves me unable to generate income off that 300

acres. I have been able to use my employees in other aspects of my business, but many less diversified operations have had to lay people off.

The effects of the California drought will also extend far beyond the Valley. The five counties of Tulare, Fresno, Madera, Kings, and Kern produce about 58 percent of the milk that California produces. California is the largest dairy state in the Nation, and these five counties alone produce about 12 percent of the total milk supply for the United States. Western United Dairymen estimates that the total economic output of the dairy industry for these five counties is about \$35 billion per year, and it generates 255,880 jobs. None of this works without Friant water. Cows can't be fallowed. They can't go for even half a day without water. Cows aren't alone in this. In the Valley, all of the agriculture needs permanent, reliable water supplies. Even though the annual crops are planted seasonally, they have been replanted every year for generations. Reliable water supplies are critical to supporting this agriculture, which is the lifeblood of our economy.

I will close by thanking this committee and members of the San Joaquin Valley Delegation for working to restore balance and reliability to the operation of the CVP and the State Water Project. But please act quickly. We're running out of time.

Attachment: Aug. 11, 2014 Letter from Jim Vidak, Tulare County Superintendent of Schools

#### ATTACHMENT

TULARE COUNTY OFFICE OF EDUCATION,  
VISALIA, CALIFORNIA,  
AUGUST 11, 2014.

To Whom It May Concern:

Much has been written about the effects of California's drought on agriculture. The same cannot be said about the effects of the drought on California's school districts.

Dotted among California's vast agricultural region are dozens of rural school districts. In Tulare County alone, we have 44 school districts—30 of them are rural districts that serve more than 12,000 students. These rural school districts operate private wells or belong to small water districts. I am writing to relay the challenges our school districts have experienced in the past six months and to encourage you to work collaboratively to ensure students in California's rural districts have safe and reliable sources of water.

Several of our school districts that operate private wells have seen critical shortages. As farmers, municipalities and school districts compete for the same severely strained groundwater supplies, some of our districts have faced water loss and increased levels of bacteria. While bottled water is available for students at a considerable expense, districts still need running water to help operate dishwashers, lavatories and toilets. The cost of drilling deeper wells (approximately \$200,000) is often prohibitive for the smaller districts.

The situation in Tulare County's rural schools is not unique. Districts in numerous San Joaquin Valley counties are facing the same water supply challenges.

Central California educators appreciate all the hard work you have done on this critical issue. We encourage you to continue to work together to find solutions to California school districts' water needs—solutions that include better use of the available natural water resources and support for increased water storage.

If you would like to speak further about the immediate water needs of Tulare County school districts, please feel free to contact me.

Sincerely,

JIM VIDAK,  
*Tulare County Superintendent of Schools.*

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Mr. MCCLINTOCK. One example is the Klamath River, where there has been a continuing movement to tear down four perfectly good hydroelectric dams because of the impact on salmon, despite the fact that we have a fish hatchery at the Iron Gate Dam that produces five million salmon smolts a year. Seventeen thousand return as fully grown adults to spawn in the Klamath every year.

But they are not allowed to be included in the population counts for the ESA purposes.

Another of the pulse flows out of California dams amidst the worst drought in recorded history of California, all to meet ESA requirements to adjust water temperature for the fish. This past fall 800,000 acre-feet was released out of dams, knowing we were going into a potentially catastrophic drought. More recently, 70,000 acre-feet was released from the Stanislaus and American Rivers for the same purpose, to adjust water temperature for the fish, knowing that we were in the worst drought in the state's history, and knowing that the snowpack had been completely exhausted. Last month, pulse flows were released from dams on the Trinity. And the irony is if the dams hadn't been built, in a drought like this there would be no river, and therefore, no fish.

Mr. Birmingham, you have seen this a lot in your region. The desiccation of the Central Valley began long before the drought was declared. Why was that?

Mr. BIRMINGHAM. Well, I can't specifically say why it was. But I think it is important to recognize that nothing in this circumstance is black and white. No one can say this year it is drought that caused the water supply reductions for Central Valley Project contractors. That is just fundamentally wrong. 1977 was a year that was much drier than this year, and we had a 25 percent supply in 1977.

You can look at the history of water year types and allocations for the Central Valley Project contractors and see that, as time has progressed over the last 22 years, the ability of the project to deliver water has diminished dramatically, and it is because of the implementation of laws that were intended to rebalance the way in which we were utilizing water: the Central Valley Improvement Act, implementation of the Endangered Species Act.

But I think—

Mr. MCCLINTOCK. Well, let me cut right to the chase. Have these diversions and pulse flows away from the Central Valley materially improved the condition of the delta smelt, for example?

Mr. BIRMINGHAM. No. In fact, the conditions of the delta smelt have continued to decline. Despite all of the water and all of the money that we have thrown at the delta smelt, the population of delta smelt has continued to decline.

Mr. MCCLINTOCK. Meanwhile, the human population has been devastated.

Mr. Huffman?

Mr. HUFFMAN. Thank you, Mr. Chair. I would request unanimous consent to submit into the record a statement that I presented, I believe earlier, from Representative George Miller in opposition to H.R. 1927.

[No response.]

Mr. MCCLINTOCK. Without objection.

[The prepared statement of Mr. Miller submitted by Mr. Huffman for the record follows:]

PREPARED STATEMENT OF THE HON. GEORGE MILLER, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF CALIFORNIA ON H.R. 1927

Mr. Chairman, members of the committee, I appreciate the opportunity to submit written testimony on the subject of H.R. 1927, "More Water and Security for Californians Act." For many years, as former Chairman and Ranking Member of this committee, I have strongly advocated for California water policy that is balanced, ensures a healthy Delta ecosystem and a sustainable water supply, and I would like to offer my perspective to the committee during its discussion of this important issue.

I do not believe that H.R. 1927 is the appropriate solution to the drought crisis that has imperiled the communities and livelihoods of my great state. In fact, this bill will do much more harm than good and we cannot afford to cause any further damage to an ecosystem that is oversubscribed and in jeopardy. This bill would significantly weaken protections for California's salmon populations and other native fish and threatens the thousands of jobs in the fishing industry. This bill will sacrifice the environment, commercial and sport fishing, and other stakeholders to benefit certain parts of California.

California Governor Jerry Brown and the Director of the California Department of Water Resources have both publicly stated that the drought—and not environmental laws—is the primary cause of California's water supply shortage. California is in the third year of a historic drought and it is this drought that is causing low water supplies for many communities and the environment. While we can agree that protections for salmon and other endangered species have had minimal impacts on water supply this year, these impacts do not justify overhauling protections that have sustained the health of the Delta and the communities and livelihoods that depend upon it.

Specifically, this bill would prohibit implementation of pumping restrictions and other protections required under both state and Federal law. H.R. 1927 explicitly preempts state law, preventing the state from protecting salmon and other wildlife. For example, this bill will allow unlimited numbers of fish like salmon and steelhead to be killed, while the Federal and state water projects will not be able to reduce pumping to reduce the number of fish kills. Another provision in the bill significantly harms fish survival through the Delta and increases mortality rates of numerous species at the pumps. These provisions are short-sighted and will devastate a fragile ecosystem that California has fought hard to protect with effective state legislation.

Congress should not be in the business of mandating what scientists and engineers are doing at the state and local level. Scientists need flexibility to respond to ever-changing conditions in real time. As we have seen this year, California water agencies have been able to successfully stretch water supplies while still abiding by the biological opinions. This can only be done if experts are able to manage operations based on sound science and not political conviction.

Additionally, this bill threatens thousands of jobs across California. Water protections for fish in the Bay-Delta protect thousands of jobs for fisherman, tourism, hospitality, and many communities in California that depend upon a healthy Bay-Delta. We cannot shift the burden of the drought in order to save one economy at the cost of another. Mandating larger water exports from a fragile Bay-Delta is not a forward-thinking statewide solution.

We owe our communities real solutions that will actually solve our water challenges. For example, the California legislature recently approved a \$7.5 billion water bond that includes substantial funding for new groundwater and surface storage, water conservation, water recycling, and other regional water supplies. This bond, if approved in November, will represent a major step forward in sustaining California's economy and environment. The collaborative effort behind the bond reaffirms the support of the Legislature and Governor for current state law that prioritizes the co-equal goals of protecting the Delta and providing a sustainable water supply. It also demonstrates that both sides of the state can come together to support solutions that successfully combat the underlying issue—that there is less water to go around in California.

As I have discussed above, H.R. 1927 is a dangerous attempt at overriding state and Federal laws in order to benefit one part of the state at the cost of other communities, livelihoods, and the health of the Delta. I hope this discussion takes into consideration these concerns. Thank you.

Mr. HUFFMAN. Thank you. I have a lot of respect for my colleague, Mr. Costa. Nobody goes to bat for their district more zealously and passionately than he does. But I think we need to remember that this drought that is depicted in the map we see is a big drought, a real drought that is affecting a huge area, including most of my district. If you look at that category of exceptional drought, most of my district is in that most extreme category, along with Mr. Costa's.

And I will just tell you that this drought is very real in the communities that I represent. Last week the Eel River, one of our largest rivers in the state, stopped flowing at Fortuna. People tell me that has never happened before. Tributaries to many of our major rivers aren't flowing any more. I have met, during the August work period, with water districts that I represent who are trucking water to people whose wells and springs aren't running any more.

So, when we hear about the impacts that we have heard a lot about today, let's remember that those are impacts shared by communities and people around the state, including the ones that I represent. There is another side to this story about salmon and the delta and the projects that are at issue here.

In 2009 we heard about a lot of the same types of suffering in the San Joaquin Valley, suffering that is very real, and that we all care about. But after the smoke had cleared, and the Fox News cameras went away, independent studies, including by the state, confirmed that the losses of jobs from the consecutive closures of the salmon fishery, including lots of communities I represent, were about the same as the losses of farm worker jobs that had been so much the subject of the discussion during that drought. And I suspect, if we are faced with salmon closures as a result of this terrible drought in the years ahead, we will see a similar loss of jobs in my communities, in my district, that will correspond with the loss of farm worker jobs. Both are real. These are real jobs, these are real communities, these are real families, and real people. So that is a context that I really want to emphasize as we proceed with this discussion.

You know, when we face crises like this unprecedented drought, we are faced with a choice of how to respond. Sometimes people come together and solve problems out of necessity. But other times they retreat to their entrenched positions and look for opportunities to overreach. Nowhere is that choice represented better than the debate that we are seeing back home in California, which is on the constructive side of that continuum, and the debate that we are seeing here in Washington, DC, which, sadly, is on the overreaching and opportunistic side of that continuum.

Back in California, the last time we saw a major drought, I worked with Mr. Birmingham and others across party lines to put some historic reforms on the table. And this year we have seen a great bipartisan outcome in a \$7 billion water bond that is going to be going to the voters. We saw a historic groundwater reform bill passed on a bipartisan basis. So it is wonderful to see that hopeful problem-solving occurring back in the home state.

Unfortunately, here we continue to deny that this critical drought even exists. We continue to represent that somehow it was caused by the Federal Government. Well, folks, we didn't fake the

moon landing, and the Federal Government didn't cause this exceptional drought, I promise you. It is an insult to science and to fact when we continue to represent things in that way. And unfortunately, we continue to look at overreaching attacks on the ESA, scapegoating, attempts to preempt state law, attempts to essentially redirect the impacts of this drought in a way that helps one set of water stakeholders in the San Joaquin Valley at the expense of other stakeholders and the environment. That, unfortunately, is what this is all about.

The biological opinions we are talking about with this bill are not a robust plan for the recovery of these fish species. They are an attempt to avoid extinction. They are the thin green line that the best available science tells us must happen, the things—the least we must do to avoid extinction.

And they are flexible, by the way. This spring the protections under those opinions were largely waived so that we could deliver some more water to exporters from the delta. That hasn't been mentioned. It is only the cries of "More, more," and the scapegoating using the Endangered Species Act that we have heard about today.

I think it is very unfortunate that, here in Washington, we are making the wrong choice in this drought, in this crisis. We are choosing to overreach, to look for opportunities to stick it to other folks that are also affected by this drought. And I urge my colleagues to oppose this bill.

Mr. MCCLINTOCK. Gentleman's time has expired. Mr. Huelskamp?

Mr. HUELSKAMP. Thank you, Mr. Chairman. I appreciate the opportunity to join your committee on a very important issue for my district, the listing of the lesser prairie chicken.

I want to ask Secretary Jennison, State of Kansas, has there been a point in time in the history of the state where we have had very low numbers of the lesser prairie chicken?

Mr. JENNISON. Yes, there are, Congressman. In the fifties, in looking at our research, in Kansas there was a significant study and work done concerning the chicken and some writing. And the reports were that after the thirties, after the dust bowl, there was only left in Kansas two very small flocks. One—and both in your area—one in Meade County, one in Seward County. Those two flocks, with some help from the department, as I said, this is not new for us to be concerned with the prairie chicken in Kansas, but through some transplanting of chickens captured, and transplanting, those two flocks made a considerable comeback. There was some discussion that a few migrants from Oklahoma may have come up, but by and large it was those two flocks. And we built the prairie chicken back up, you know, up to the fifties. And of course, we had the big drought in the fifties.

The species is certainly better off today than it was after the dust bowl of the thirties, and it was rebuilt after that. And, actually, there is about 10 percent more grass area in Kansas today than there was in the fifties, even considering the CRP that has been taken out.

Mr. HUELSKAMP. So, as I understand, efforts by the state and voluntary efforts by property owners, and not much Federal action,

actually took two small flocks, one in my home county, and actually developed today to where we have thousands of lesser prairie chicken across the state. Is that correct?

Mr. JENNISON. That is correct. And, actually, the department, at that point, experimented with propagation, you know, discovered that they could actually raise them; there are a lot of difficulties with raising prairie chicken as opposed to pheasant or quail, because they like to see something move, but they never did implement a release program at that point. But there was considerable research and time spent with the chicken.

Mr. HUELSKAMP. Well, thank you, Mr. Secretary. I know yourself and many others across the five-state area worked very hard and very diligently, not just in the last year or two, but for decades to do what constituents were wanting to do long before the Endangered Species Act. And again, this was before 1973. This is in the thirties and forties and fifties and sixties, and before 1973.

I would like to ask, though, the representative of U.S. Fish and Wildlife Service, in October 2013 is it correct you endorsed the five-state plan for the lesser prairie chicken?

Mr. FRAZER. We did, as an effective conservation strategy.

Mr. HUELSKAMP. And why did you endorse that plan?

Mr. FRAZER. The state fish and wildlife agencies have great expertise in lesser prairie chicken. They came together and worked to develop a conservation strategy that applied across the full range, and we applauded that.

Mr. HUELSKAMP. Do you think it would work in order to achieve the goal of meeting these—well, the numbers you are trying to achieve for the lesser prairie chicken?

Mr. FRAZER. That is why we endorsed it, and why we, when we listed the species as a threatened species, we included a Section 4(d) rule that basically says that if landowners, companies sign up and participate in the state-led conservation strategy, there will be no additional regulation under the Endangered Species Act. It was to give incentive to sign up and to work with the states and to have them continue to work with the states, as opposed to having to work with the Fish and Wildlife Service.

All we care about is conservation of the bird. They have an effective conservation strategy. We encourage landowners to participate—

Mr. HUELSKAMP. So you—and I am about out of time here, Mr. Frazer—so you endorsed the plan, but then you went ahead with the listing.

I want to ask Secretary Jennison what kind of message does this send to you and the four other states, when you had a plan, they endorsed it, but then they proceeded with a listing.

Mr. JENNISON. Well, we were certainly disappointed. And I would say we have always had a great partnership with U.S. Fish and Wildlife. The best way to explain it—and I think, Congressman, you will understand it—it is kind of like being in a family farm partnership with your dad. You are in a family farm partnership, but what Dad says goes.

And in this particular instance, I believe the U.S. Fish and Wildlife is wrong. And while I said earlier in my testimony, “No one ever said, ‘If you guys do this we are not going to list it,’” it

might even be strong for me to say it was implied, but it was certainly the goal behind what all the states were working for, is to work with the Service on developing a range-wide plan, recognizing what it would mean for that area if it was listed, and the challenges that it would create. And I do think that they made a mistake.

When the range-wide plan was done, and you look at it, you look at this as this is a great model to move forward with conservation. And I think that, you know, with being in the saddle that far with the Service, and then for them to not recognize just the sheer potential of the range-wide plan and go ahead and list the chicken, I think was a mistake, and I think it has probably set us back in dealing with the volunteers.

Mr. MCCLINTOCK. Thank you.

Mr. HUELSKAMP. Thank you, Mr. Secretary, thank you Mr.—

Mr. MCCLINTOCK. The gentleman's time has expired. Mr. Stewart?

Mr. STEWART. Thank you once again, Mr. Chairman, and to the members of the panel, for your testimony and for those of you who participated, and to the committee for considering my bill, the Endangered Species Improvement Act of 2014.

We understand that there are various opinions on this. But, honestly, I just don't know how anyone can oppose this piece of legislation. It is such common sense, and hardly controversial to say that if we are listing a species as endangered, that we would want to know how many of them there are, and that we wouldn't distinguish between those that are living on private land, or those that are living on public lands.

That is the intent of this piece of legislation. And again, I don't see why that would raise much ruckus or much opposition. But, you know, when it comes to environmental issues and endangered species, of course, there is much controversy.

Mr. Li, I appreciate your testimony, although I have to tell you that I disagree with the presumption that there would be a wholesale effort or slaughter of these animals just because they exist on private lands versus public lands. I think it belies the fact that none of us want to see a species go extinct. I don't know a single person who would consider that a desirable outcome.

And, in fact, quite the opposite. Those of us who live in the West live there because we love the West, because we love the environment, we love the nature and the other good things that surround us.

For 41 years the Federal Government has acted as if the people of Utah—and this came out in Commissioner Miller's testimony, and others—as if the people of Utah wanted to do just that, as if we didn't care about these species, whether it is the prairie dog, or the tortoise, or many others, including the prairie chicken and some of the others that we are considering for future listings.

And I have to commend Director Dan Ashe and Mr. Gary Frazer once again. I mentioned them in my introduction to the commissioner, that they have been really a breath of fresh air in working with us, and in recognizing that there is a better solution than what we have been doing for the last 20 years. And just—honestly, it is amazing what can happen when the Federal Government

comes and acts as a partner, rather than acting in opposition, or as a critic of some of the efforts that the local or state governments are trying to do.

So, with that introduction, I would turn to you, Mr. Miller, and I would ask you to just briefly update us on this current situation in Iron County in regards to the Utah prairie dog, and the progress that you have made in that. And I think we could end on an encouraging note, if you would.

Mr. MILLER. Just over the last—as I mentioned in my previous testimony, just over the last year to year-and-a-half, as we have really buckled down and worked together, Fish and Wildlife did come to the table, and I will give them my compliments for the added effort that they have put forward.

But I think it was clarified in previous testimonies that the Fish and Wildlife is not going to recover species without states, private citizens, tribal communities getting involved to protect the species. And, frankly, as we have worked together, and as we have adamantly driven toward that two-pronged approach that, yes, we want the recovery of the species, but more along the lines that they have that responsibility and we, as local governing officials, have the right and the obligation, constitutionally, to protect the life, liberty, and property of our constituents. We can meet together, we don't have to have mutually exclusive objectives. And we can find ways to work these things through. And, as we have done that, we have accomplished that end.

It is very concerning to me that we do have many, many non-governmental organizations that have got into the middle of these good relationships and, for their own ends and their own purposes—which I, frankly, see as the most profitable non-profit program in the world, where they can feed themselves on the backs of U.S. taxpayers in order to continue the propagation of their own enterprise. And many are well-intended, I understand that. But, unfortunately, we are seeing litigious nature, a litigious nature, and I would like to see those efforts necessary to help minimize those interventions and those impacts.

Let's work with U.S. Fish and Wildlife as they do their job well. I am sure there is room for some improvements. But as we work together, and as we focus in, we can see just the—and again, we need to work with Congress, and I appreciate and laud the efforts of those who have brought forth these very important bills. And I just want to emphasize how important improving the Endangered Species Act is. It was a big, rough rock rolling, and those rough edges need to be chipped off, and we need to be able to work through these things together.

Mr. STEWART. Commissioner, thank you again to those and others for your efforts, and you have been—you and others have been leaders on this. We, again, have the same objective, and that is to protect these species, but to protect the individuals that surround them, as well.

So, Mr. Chairman, thank you. I yield back.

Mr. MCCLINTOCK. The gentleman's time has expired. Are there any further questions of the witnesses?

[No response.]

Mr. MCCLINTOCK. Seeing none, I would like to thank the witnesses for their valuable testimony today.

Members of the committee may have additional questions, and we would ask that you respond to those in writing. The hearing record will be kept open for 10 business days to receive those responses.

And if there is no further business, without objection, the committee stands adjourned.

[Whereupon, at 12:58 p.m., the committee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

STATEMENT OF DAN NELSON, EXECUTIVE DIRECTOR, SAN LUIS & DELTA-MENDOTA  
WATER AUTHORITY ON H.R. 1927

MAY 10, 2013

# **WATER LEGISLATION PROVIDES SENSIBLE WAY TO BALANCE FISH, WATER SUPPLY NEEDS**

The major legislation introduced today by Congressman Jim Costa creates a sensible way of balancing the protection of fisheries while providing reasonable water supplies for families, farms and disadvantaged rural communities throughout the San Joaquin Valley.

The legislation maintains core provisions of the fish protections governing water deliveries while providing long-absent reliability for the thousands of farmers, farmworkers and millions of Californians who rely upon a secure delivery of water to create jobs, expand the economy and feed a nation.

While public water suppliers continue to work with state and Federal agencies to develop long-term environmental and water supply solutions for the Delta, meaningful and vital steps must be taken now to protect California's future.

After 20 years of nearly continuous water shortages driven by Federal environmental regulations, our coping strategies are all but exhausted. Our farmers have installed drip irrigation on several hundred thousand acres, have permanently retired a hundred thousand acres from irrigation and annually leave hundreds of thousands of acres unfarmed depending on the severity of the cutbacks. Sadly, the social and economic pain inflicted on our communities has not resulted in any gains for the fisheries as the regulators had hoped.

We all want to see a healthy ecosystem, but we should all acknowledge the failed approaches in that pursuit. It is time for reasonableness, sensibility and balance.

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*The San Luis & Delta-Mendota Water Authority serves 29 member agencies reliant upon water conveyed through the California Bay-Delta by the United States Bureau of Reclamation's Central Valley Project. These public water agencies deliver water to approximately 1.2 million acres of prime farmland, 2 million California residents, and millions of waterfowl dependent upon the more than 100,000 acres of managed wetlands within the Pacific Flyway.*

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LETTERS SUBMITTED FOR THE RECORD ON H.R. 1927

CITY OF DOS PALOS  
DOS PALOS, CALIFORNIA,  
AUGUST 28, 2014.

## **Requesting that Congress Act on Drought Legislation**

Dear Officials:

I am the Mayor of the City of Dos Palos, California. This is small town America at its best. Our community's economy is based on Agriculture. Our area is known for its production of Cotton, Tomatoes, Corn, Canteloupes, Alfalfa Hay, Milk, Cattle, Almonds, Pomegranates, and Rice. We also produce large quantities of Honey, Garlic, Onions, Wheat, Peppers, Honeydew, Watermelons, Cucumbers, Squash, Pumpkins, Zucchini, Pistachios, Peaches, Apricots, Figs, Grapes, Quince, and Sheep! Our local Agribusinesses include irrigation systems, harvesting, baling, trucking, ginning, processing, farm credit and commercial lending, crop insurance, inspection,

scientific analysis, farm equipment sales and repairs, steel fabrication, welding, training, and computer technology! Our people work as farmworkers, supervisors, managers, owners, mechanics, truckers, dairymen, farmers, computer technicians, bankers, sales staff, and more. Together we produce the food, fiber, and fuel that drive the economy, meet payrolls that keep people employed, and provide the tax base for our schools and government services. All of this is possible because of water!

Right now we are experiencing California's most devastating drought and the hottest year since records have been kept. Our domestic food supply is threatened. Our farms and businesses have been hanging on, barely surviving for the last few years, but can't hang on much longer. Our resources are limited. Once these operations go out of business, they will not come back. Our area is too isolated and alternatives are few.

State and Federal Mandates have further complicated our water availability and quality. Much of our problem is manmade and can be fixed. Imbalanced implementation of the Federal Endangered Species Act has reduced or prevented water deliveries to the Exchange Contractors. This impact reaches far beyond agriculture. Our City receives its drinking water from this same surface water source. In the past year alone, we have seen reduced flows and lower quality water. Substituted sources loaded with algae have clogged our siphons and filters. We've endured periods without water, experienced water rationing, and have implemented the most stringent water conservation measures. While our families and children have gone without water, other environmental and wildlife protection agencies have not had to face similar conditions. We become outraged as we watch a mainline break at UCLA "waste" water, but we allow ten times that amount daily to be released to the Ocean unchecked! It doesn't have to be this way.

Let's start by working together to reduce the impacts of bad decisions and reach solutions. The House has passed H.R. 3964 the Sacramento/San Joaquin Valley Emergency Water Delivery Act. The Senate has passed S. 2198 the Emergency Drought Relief Act. Now Members must reconcile these separate bills into one Drought Relief measure acceptable to both houses and which the President will sign. This needs to be done now!

Sincerely,

JERRY ANTONETTI,  
*Mayor of the City of Dos Palos.*

CITY OF FRESNO,  
FRESNO, CALIFORNIA,  
JULY 10, 2014.

TO:

Hon. Dianne Feinstein  
Hon. Barbara Boxer  
Hon. Kevin McCarthy  
Hon. Doug LaMalfa  
Hon. Tom McClintock  
Hon. Paul Cook  
Hon. Jeff Denham  
Hon. David Valadao  
Hon. Devin Nunes

Hon. Howard McKeon  
Hon. Gary Miller  
Hon. Ed Royce  
Hon. Ken Calvert  
Hon. John Campbell  
Hon. Dana Rohrabacher  
Hon. Darrell Issa  
Hon. Duncan Hunter  
Hon. Jim Costa

Dear Member of Congress:

We write in our individual capacities to thank each of you for the effort you have made to address the dire water situation facing the State of California. The passage of S. 2198, the Emergency Drought Relief Act out of the U.S. Senate, and H.R. 3964, the Sacramento-San Joaquin Valley Emergency Water Delivery Act out of the U.S. House of Representatives, are significant and commendable milestones. The efforts you have taken are greatly appreciated. We are, however, acutely aware of the need for you to promptly resolve the differences between these bills before any legislation will become law. We also know that we are in urgent need of a change in law.

Therefore, we are asking each of you to work diligently and in good faith to bridge your differences. Failure will ensure that the current regulatory and policy regimes that were put in place to improve the health of the Delta and the Central Valley, but have actually done the opposite, will continue unchecked. As a result, more

acreage will be followed further diminishing our ability to provide a safe and sustainable food supply and threatening our national security. In addition, the demands on food banks, existing high unemployment, the inability of families to pay utilities and stay in their homes, and the lack of job opportunity that already exists in disadvantaged communities will all be exacerbated.

To facilitate the resolution of your differences, we have come together to emphasize the concepts we believe are essential to any legislation that moves forward. To be meaningful, any bill must:

- Provide congressional direction concerning the operation of the Central Valley Project and the State Water Project to ensure sufficient operational flexibility to restore water supply and water supply reliability. The operators of these projects must be able to capture water from the Delta during periods of higher flows and move water from north to south in a rational way.
- Extend the provisions of any legislation for a period of time that will allow communities to establish sound long term water supplies for their future;
- Establish a process that could lead to increased storage in a reasonable timeframe;
- Ensure that additional burdens are not placed on the State Water Project as a result of congressional action; and
- Recognize that the reasonableness and efficacy of the San Joaquin River Restoration Program must be reevaluated in light of changed conditions since its authorization, including the reality of federal budget constraints.

We are optimistic that if you focus on addressing these concepts, you can resolve your differences in time to provide our communities the needed relief. It is time for you to move forward with policies that restore regulatory balance, achieve benefits, and improve the social, economic, and environmental health of much of California.

Respectfully,

*Georganne White*  
Dir., Friant Water Authority

*Kimberly Brown*  
Paramount Farming Company

*Loren Booth*  
President, Booth Farms

*Cannon Michael*  
President, Bowles Farming

*Jim Nickel*  
President, Nickel Family

*Mark Watte*  
Partner, Watte & Sons

*John Bennett*  
President, JFB Ranch

*Mike Stearns*  
General Manger, Hammonds Ranch

*Harvey Bailey*  
President, Bailey Brothers Farming

*Dan Errotabere*  
Partner, Errotabere Ranches

*Paul Adams*  
Booth Farms

*Kent Stephens*  
Sunview Vineyards of Calif.

*Ashley Swearengin*  
Mayor—City of Fresno

*Earl Perez*  
President, Perez Farms

*Sarah Woolf*  
Partner, Clark Bros. Farming

*William D. Phillimore*  
Paramount Farming Company

*Tom Barcellos*  
T-Bar Dairy/Barcellos Farms

*Ted Page*  
Partner, Bookland Farms

CITY OF FRESNO,  
FRESNO, CALIFORNIA,  
SEPTEMBER 7, 2014.

Hon. JIM COSTA,  
*U.S. House of Representatives,*  
*1314 Longworth House Office Building,*  
*Washington, DC 20515.*

Re: H.R. 1927

DEAR CONGRESSMAN COSTA:

Thank you for allowing the City of Fresno the opportunity to submit testimony regarding H.R. 1927, the "More Water and Security for Californians Act." The City appreciates your efforts, and the efforts of your colleague Mr. Valadao through H.R. 3964 to provide congressional direction for implementation of the Endangered Species Act as it relates to operation of the Central Valley Project, and to develop water supplies that are desperately needed here in the Valley.

As you know, this area is currently suffering through the worst water supply crisis in its history. The combination of the drought, the mismanagement of the scarce supplies that were available this year, and the need to provide water for the fifth largest city in the State of California are all critical issues that must be addressed.

The Fresno area has relied on groundwater to meet the community's water supply needs since the first water system was placed into service. The Fresno area's reliance on groundwater for approximately 140 years has resulted in severe over-drafting of the groundwater aquifer. Unfortunately, groundwater levels continue to fall in the Fresno area at the rate of approximately 1 foot per year.

The City of Fresno holds a contract for 60,000 acre-feet per year surface water supply allocation at Millerton Lake (Friant Division) from the United States Bureau of Reclamation (USBR). Initially, the water supply allocation was used by the City to recharge the groundwater aquifer through the use of constructed recharge basins. Today, the City's current water resources management strategy is based on recharging approximately 55,000 acre-feet per year, utilizing the Millerton Lake allocation via a multi-million dollar capital improvement plan funded by our ratepayers.

In 2004, the City of Fresno constructed a 30 million gallon per day surface water treatment facility to treat surface water from Millerton Lake using the Friant-Kern Canal as the primary raw water conveyance delivery system. This is the City's primary surface water treatment facility, and was constructed for the sole purpose of using the City's surface water allocation so that groundwater over drafting could be reduced.

This year, the United States Bureau of Reclamation's (USBR) decision to provide a 0% allocation to Friant Division contractors has wreaked havoc on the water resource management strategy for the City. The current 0% allocation and the possibility of a second year of 0% allocations reduces our ability to operate our surface water treatment facility and comply with the legal mandates stipulated in the new Sustainable Groundwater Management Act recently signed into law by Governor Brown.

In addition to new groundwater regulations, the California State Water Resources Control Board has identified 1,2,3-trichloropropane (1,2,3-TCP) as a pollutant of concern known to cause cancer. Based on the cancer-causing concern, the State Water Resources Control Board is developing a maximum contaminant level (MCL) regulation for 1,2,3-TCP to protect public health, and the proposed regulation is expected to be released for public comment in late 2014 or 2015. Regrettably, there are approximately 56 groundwater wells in Fresno that have detected the presence of 1,2,3-TCP. The City's plan to eliminate the risks of 1,2,3-TCP is to replace the groundwater supply from these groundwater wells with surface water supply from the City's water supply allocation from Millerton Lake. Again, the USBR's possible elimination of the City's surface water allocation for a second year severely damages and calls into question our ability to use our surface water allocation to mitigate the health risks associated with this pollutant of concern known to cause cancer.

The residents of Fresno have made significant investments in water supply, treatment, and recharge facilities based on representations that the USBR would honor its commitment to deliver the City's water supply allocation from Millerton Lake. We believe it is unconscionable that the USBR would now—after significant time and expense have been invested by the community—not honor their historic commitment and allow our residents' investments to become stranded assets to the detriment of the community.

In closing, we believe the USBR should honor its water supply commitments to the City of Fresno so that we may provide our 505,000 residents a clean, safe and affordable water supply. Clearly, the Central Valley Project is not being operated as intended. Any direction from Congress that will develop desperately needed water supplies would be welcomed.

If you have any questions, please do not hesitate to contact me or my Chief of Staff, Georgeanne White.

Sincerely,

ASHLEY SWEARENGIN,  
*Mayor.*

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FRESNO COUNCIL OF GOVERNMENTS,  
FRESNO, CALIFORNIA,  
AUGUST 19, 2014.

Hon. DIANNE FEINSTEIN,  
Hon. BARBARA BOXER,  
*U.S. Senate,*  
*Washington, DC.*

Hon. DAVID VALADAO,  
*U.S. House of Representatives,*  
*Washington, DC.*

Dear Senators Feinstein and Boxer, and Representative Valadao:

The Fresno Council of Governments encourages you and your colleagues to do everything possible to achieve successful passage of the drought relief legislation now within the Congressional Conference process.

The Fresno COG's membership includes the County of Fresno and all 15 cities located within Fresno County. Our organization's role is that of a consensus builder as our board members—all of whom are elected officials—seek to frame acceptable programs and find solutions to issues that do not respect political boundaries such as water resources.

The current water shortages now being experienced and the growing water crisis enveloping all parts of Fresno County and California are adversely affecting everyone of our constituents. There may be little that can be done to allay the immediate water-related problems we are facing but you certainly have the opportunity to ease or even resolve future problems by re-crafting federal law.

We are not seeking federal handouts or other temporary short-term aid. We are asking that the fundamental flaws in federal water management, including administration of the Endangered Species Act, be addressed and settled in a common-sense manner that protects the needs of the people we serve.

We are extremely pleased with the passage of H.R. 3964, the Sacramento-San Joaquin Valley Emergency Water Delivery Act, and S. 2198, the Emergency Drought Relief Act; however, now we ask you to take the next vital step. We expect you to successfully meld these widely differing Senate and House bills into what has the potential, for water users in Fresno County and throughout the central San Joaquin Valley, to perhaps be the most important federal legislation of 2014.

You are well aware of Fresno County's long-standing state and national leadership in agricultural production as well as its growing population and business communities in cities and towns, of which all are dependent upon safe, reliable supplies and quantities of water. That is simply not occurring as a result of the near record drought but, more importantly, because of resource management by federal agencies that has relied upon questionable regulatory mandates. In many cases, these mandates have curtailed and even eliminated allocations of water supplies in large portions of Fresno County. Fresno County residents and those in agriculture have had to over-use groundwater to survive, resulting in a separate crisis involving plunging water tables. Scores of wells have failed.

The situation we face is devastating. Many of the dry-year woes we are facing are, of course, related to the drought but many more can be blamed directly on policy decisions of the state and federal water project operators that have impacted the ability to provide water to the San Joaquin Valley at crucial times this year. The domino effect of this drought is impacting employment and business activity, as well as social and economic harm to the people of Fresno County.

Please act now in the best interest of all water users. Act in good faith to set aside political differences in order to bridge and resolve differences in this important legislation to protect the health and welfare of the citizens of our cities, Fresno County and the San Joaquin Valley.

Sincerely,

AMARPREET DHALIWAL,  
*Chair, Fresno Council of Governments,  
Mayor, City of San Joaquin.*

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COUNTY OF FRESNO,  
BOARD OF SUPERVISORS,  
FRESNO, CALIFORNIA,  
AUGUST 7, 2013.

Hon. DIANNE FEINSTEIN,  
*U.S. Senate,  
331 Hart Senate Office Building,  
Washington, DC 20510.*

Re: Water Crisis Facing Fresno County

DEAR SENATOR FEINSTEIN:

The Fresno County Board of Supervisors is very concerned that the County is facing a repeat of the disaster suffered in 2009 resulting from a 10% allocation to Central Valley Project ("CVP") water service contractors that serve water to farmers in western Fresno County. As a result of reduced water supplies in 2009 more than 300,000 acres of land in Fresno County were fallowed, tens-of-thousands of farm workers lost their jobs, disadvantaged communities experienced unemployment rates in excess of 40%, the poor were forced to stand for hours in food lines, the Fresno County Sheriff reported an increase in crime, including domestic violence, and there was an increase in mental health problems. This situation cannot be allowed to repeat itself.

Congressman Jim Costa has introduced H.R. 1927, the More Water and Security for Californians Act. If enacted, as currently written this legislation would:

- Provide congressional direction concerning application of the Endangered Species Act to the CVP and the State Water Project ("SWP");
- Restore operational flexibility to California's two major water projects; and
- Provide reasonable protection to threatened species.

We hope that you will introduce similar legislation.

Westlands Water District has projected that if California has average precipitation in October, November, December, and January, the initial allocation for CVP water service contractors next year will be zero, and if the remainder of the winter and spring is dry or average, the final allocation will be from zero to 10%. We understand that the Bureau of Reclamation has confirmed this analysis. This projection is already affecting western Fresno County's agricultural industry. Farmers, who are currently planning next year's farming operations, are deciding to not plant row crops, such as fall lettuce, tomatoes, and garlic. Additionally, many farmers are struggling to find financing for their operations because lenders are reluctant to make loans in the light of inadequate water supplies. These decisions will undoubtedly affect the most vulnerable residents of western Fresno County in ways that are identical to impacts in 2009.

**This disaster is avoidable.** If in 2014 the CVP is allowed to operate as it did in 2010 and 2012, which were average water years, farmers could reasonably expect to get a 40%–45% allocation if we have an average water year. The legislation Mr. Costa has introduced would allow this to happen by prescribing operational rules that are nearly identical to operations that occurred in 2010 and 2012. Moreover, if enacted, as currently written this legislation would enable the Bureau to forecast operations that would allow it to make a higher allocation earlier in the year because it would not face the unknown of how the biological opinions will apply to operations of the CVP Delta pumping plant. For example, under the existing biological opinion for Delta smelt, management of reverse flow in Old and Middle Rivers can range from –1250 cubic feet per second to –5000 cubic feet per second during the period from December through the end of June. With this uncertainty, the

Bureau has to wait until the end of May or June to make the higher allocations which is too late for planting.

It must also be noted that the operations of the CVP that occurred in 2010 and 2012 did not place the threatened or endangered fish at any risk. In fact, those operations were consistent with the existing biological opinions, and Mr. Costa's legislation would direct that the CVP and the SWP to be operated in way that has provided adequate protection for fish. The only exception is that the inflow/export ratio imposed by the Salmon biological opinion in April and May would not apply. However, when the National Academy of Sciences reviewed this fishery action in response to your request that the Academy review the efficacy of the biological opinions, the Academy raised significant questions about the need for this action. Specifically, the Academy described the influence of rates of export on salmonid survival rates as "weak."

We are aware of all that you have done over the course of the last two decades to ensure that farmers on the westside of the San Joaquin Valley would have enough water to farm and to put people to work. We know, for example, that the Delta-Mendota Canal, California Aqueduct Intertie was constructed and is being operated under legislation that you introduced, that achieving a 45% allocation in 2010 was a result of your intervention with the Department of the Interior, and that legislation you authored has facilitated numerous water transfers to westside farmers. Your leadership on this issue has helped sustain irrigated agriculture in western Fresno County and other parts of the San Joaquin Valley. But we fear that those actions have not been enough. Without immediate, further action, the people who live and work in western Fresno County will experience needless suffering of the type experienced in 2009.

We also are aware that introducing legislation that provides congressional direction concerning application of the Endangered Species Act to the CVP and the SWP will be vigorously opposed by environmental organizations as an attack on the Act itself. But we are prepared to support you if you determine that taking on this "heavy lift" is required to avoid that needless human suffering.

We absolutely need legislation that will restore some sanity to achieving a reasonable balance between meeting the needs of the environment and the needs of our people. Worth noting is that we support this effort and others, that have or may be introduced. We look forward to working with you and encourage you to work with our entire Valley delegation to bring resolution on this vitally important issue.

Sincerely,

HENRY PEREA, CHAIRMAN,  
*Supervisor, District 3.*

ANDREAS BORGEAS, VICE-CHAIRMAN,  
*Supervisor, District 2.*

PHIL LARSON,  
*Supervisor, District 1.*

JUDITH G. CASE,  
*Supervisor, District 4.*

DEBORAH A. POOCHIGIAN,  
*Supervisor, District 5.*

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GRASSLAND WATER DISTRICT,  
LOS BANOS, CA,  
AUGUST 6, 2013.

Hon. JIM COSTA,  
*U.S. House of Representatives,*  
*1314 Longworth House Office Building,*  
*Washington, DC 20515.*

Re: Support for H.R. 1927, More Water and Security for Californians Act

DEAR REPRESENTATIVE COSTA:

I am writing on behalf of the Grassland Water District (GWD) and the Grassland Resource Conservation District (GRCD) to express our support for H.R. 1927, the "More Water and Security for Californians" act.

As you know, the Central Valley Project Improvement Act (CVPIA) was signed into law by the 102nd Congress on October 30, 1992 to address the impacts of the Central Valley Project (CVP) on fish and wildlife and associated habitats. CVPIA called for full Level 4 water supplies for state and federal refuges and the private wetlands of the GRCD by 2002. Sadly, 11 years later federal officials have yet to carry out this critical CVPIA mandate.

The Grassland Water District delivers water to state, federal, and privately managed wetlands located within the Grassland Ecological Area (GEA) of western Merced County, California. The GRCD represents over 2,000 members and 67% of the wetland habitat south of the Delta. For more than 60 years, the private land-owners and sportsmen within the Grasslands, working with public agencies, as well as the environmental and farming communities, have been responsible for preserving and maintaining the largest freshwater marsh on the Pacific Flyway. The GEA has achieved international recognition by the RAMSAR convention and the Western Hemisphere Shorebird Reserve Network, and as a Globally Important Bird Area by the American Bird Conservancy and National Audubon Society.

Because the Grassland Water and Resource Conservation Districts are passionate about protecting this precious wildlife resource for generations to come, and H.R. 1927 will provide more flexibility for managing California water, we wholeheartedly support your fair approach to solving this ongoing water crisis.

Sincerely,

RICARDO ORTEGA,  
*General Manager.*

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KERN COUNTY,  
BOARD OF SUPERVISORS,  
BAKERSFIELD, CALIFORNIA,  
JULY 29, 2014.

Hon. BARBARA BOXER,  
Hon. DIANNE FEINSTEIN,  
*U.S. Senate,*  
*Washington, DC 20510.*

Hon. KEVIN MCCARTHY,  
Hon. DAVID VALADAO,  
*U.S. House of Representatives,*  
*Washington, DC 20515.*

Re: Support for Compromise on S. 2198, H.R. 3964

The Kern County Board of Supervisors thanks you for your efforts to address California's increasingly severe water crisis. The passage of S. 2198, the Emergency Drought Relief Act out of the U.S. Senate, and H.R. 3964, the Sacramento-San Joaquin Valley Emergency Water Delivery Act out of the U.S. House of Representatives, are significant and commendable milestones. Our Board now urges you to resolve the differences between these bills so that this emergency legislation can swiftly become law.

We call upon each of you to work diligently and in good faith to bridge your differences. Failure will ensure that the current regulatory and policy regimes that were put in place to improve the health of the Delta and the Central Valley, but have actually done the opposite, will continue unchecked. As a result, more acreage will be fallowed, further diminishing our ability to provide a safe and sustainable food supply and threatening our national security. In addition, the demands on food banks, existing high unemployment, the inability of families to pay utilities and stay in their homes, and the lack of job opportunity that already exists in disadvantaged communities will all be exacerbated.

Our Board supports the concepts below as essential elements of any legislation that moves forward. To bring meaningful relief, any bill must:

- Provide congressional direction regarding operation of the Central Valley Project and the State Water Project to ensure sufficient flexibility to restore water supply and water supply reliability. The operators of these projects

must be able to capture water from the Delta during periods of higher flows and move water from north to south in a rational way.

- Extend the provisions of any legislation for a period of time that will allow communities to establish sound long-term water supplies for their future;
- Establish a process that could lead to increased storage in a reasonable timeframe;
- Ensure that additional burdens are not placed on the State Water Project as a result of congressional action; and
- Recognize that the reasonableness and efficacy of the San Joaquin River Restoration Program must be reevaluated in light of changed conditions since its authorization, including the reality of federal budget constraints.

We hope that by addressing these concepts, you can resolve your differences in time to provide our communities the needed relief. For the sake of California's current and future water supplies, we urge you to move forward with policies that restore regulatory balance, achieve benefits, and improve the social, economic, and environmental health of much of California.

Sincerely,

LETICIA PEREZ,  
*Chairman.*

MICK GLEASON,  
*First District Supervisor.*

ZACK SCRIVNER,  
*Second District Supervisor.*

MIKE MAGGARD,  
*Third District Supervisor.*

DAVID COUCH,  
*Fourth District Supervisor.*

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LATIN BUSINESS ASSOCIATION,  
LOS ANGELES, CALIFORNIA,  
AUGUST 18, 2014.

Hon. DIANNE FEINSTEIN,  
Hon. BARBARA BOXER,  
*U.S. Senate,*  
*Washington, DC 20510.*

Hon. DAVID VALADAO,  
*U.S. House of Representatives,*  
*Washington, DC 20515.*

Dear Members of Congress:

The Latin Business Association has closely followed progress of the drought relief legislation that has passed the House (H.R. 3964, the Sacramento-San Joaquin Valley Emergency Water Delivery Act) and Senate (S. 2198, the Emergency Drought Relief Act) and which is now in conference. Our organization sees the opportunity presented by this legislation as critically important to Latino Californians and the 800,000 Latin businesses in California that we are privileged to represent.

As you may know, the Latin Business Association (LBA) is a 501(c)(6) private non-profit organization. Since the LBA's establishment in 1976, our Association has become one of the nation's most active Latin business trade associations. We serve as a unifying voice for Latin businesses, advocating for opportunities that set business owners at a higher class of competitiveness. The LBA is committed to the success of its members, partners and supporters.

California's water shortages and the repeated crises that have resulted are the products of federal and state regulatory mandates and water supply curtailments as well as the current drought which has now gripped every inch of California for three terribly dry years. Shortages of water have hit all parts of the state—both urban and rural—unmercifully. Latinos and Latin-owned businesses have been among most negatively impacted economically by the crisis through growing unem-

ployment, and businesses declines and failures. By the millions, lives of Latinos and other Californians are being adversely affected.

The LBA is increasingly troubled and concerned with this situation. As so much of the current water crisis stems from what have proven to be ineffective and even misguided federal policies and regulatory mandates, we believe the legislation now being framed in conference must result in restoration of a reliable, secure and safe water supply to the health, prosperity, and well being of Californians.

Our organization is based in Los Angeles. Much of the water delivered within Southern California originates in Northern California and can only be conveyed to Southern California and the City if adequate supplies are permitted by federal and state agencies to be exported from the Sacramento-San Joaquin Delta. Southern California's well-being depends largely upon this water supply, which is delivered by the Metropolitan Water District of Southern California under a State Water Project contract.

This year, Metropolitan's Delta water supply from the State Water Project has been withheld under a zero allocation as a result of natural drought and federal and state regulatory mandates. That allocation is to be increased on September 1, but only to 5% of contract amounts. This minimal State Water Project supply is in addition to greatly reduced Colorado River supplies delivered to Metropolitan as well as much lower than normal availability of Los Angeles Department of Water and Power supplies from the Owens Valley system. These water supply curtailments are negatively impacting groundwater levels of the region, creating further adverse effects on the water supply situation.

The federal legislation your conference is considering must address, repair and modify federal policies that have led to so much failed management by federal and state agencies in the Sacramento-San Joaquin River Delta, particularly as a result of imbalanced implementation of the federal Endangered Species Act. We are incensed that because of management decisions and actions made and taken earlier this year under the ESA, capture of hundreds of thousands of acre-feet of early spring 2014 runoff that occurred during this drought year's only significant storms were permitted to flow unimpeded to the ocean, unnecessarily worsening California's water crisis.

Southern California's residents and food distribution businesses rely upon California agriculture as a major source of safe and high quality food and related products but these same Delta water supply curtailments have also led to fallowing of large acreages of Central California farmlands that rely for irrigation supplies on the federal Central Valley Project and State Water Project. Neither project to date has been unable to provide any contract water supplies.

Action in Congress must be taken immediately if these and so many other water-shortage problems, plus another year of regulatory drought, are to be avoided. While we appreciate that both the House and Senate have passed legislation, these bills significantly differ. All members of California's Congressional delegation must set aside political differences for the benefit of all Californians. You simply have to agree on a joint drought relief measure that can be adopted by both houses of Congress and signed by the President.

Sincerely,

RUBEN GUERRA,  
*Chairman and Chief Executive Officer.*

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PARAMOUNT FARMING COMPANY,  
BAKERSFIELD, CA,  
JULY 30, 2013.

Hon. JIM COSTA,  
*U.S. House of Representatives,*  
*Washington, DC 20515.*

DEAR REPRESENTATIVE COSTA:

I am writing on behalf of Paramount Farming Company (Paramount) in support of H.R. 1927, "More Water and Security for Californians Act," as introduced on May 9, 2013. Paramount, and its related entities, is one of the largest growers and processors of almonds, pistachios, citrus and pomegranates in California.

Paramount takes pride in our environmental conservation and sustainability practices, and makes it our passion to provide high quality products through responsible

agricultural processes. As an agricultural entity in the San Joaquin Valley, water access and reliability issues are constantly areas of great concern. We appreciate the work you have done in the past supporting similar legislation that would bring more water to farmers, farm workers, and farm communities in the Valley, and would like to express our support for H.R. 1927.

Sincerely,

WILLIAM D. PHILLIMORE,  
*Executive Vice President.*

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PORTERVILLE IRRIGATION DISTRICT,  
COUNTY OF TULARE, CALIFORNIA,  
SEPTEMBER 7, 2014.

Hon. JIM COSTA,  
*U.S. House of Representatives, 16th District,*  
*1314 Longworth House Office Building,*  
*Washington, DC 20515.*

Re: H.R. 1927

DEAR CONGRESSMAN COSTA:

We appreciate the opportunity to submit testimony in support of H.R. 1927, the "More Water and Security for Californians Act". Water is the lifeblood of our communities here in Tulare County, and it is critically important to be assured of a reliable supply.

The water districts on the east side of the San Joaquin Valley have contracts with the Bureau of Reclamation and normally receive, on average, 1.2 million acre-feet of water from the Friant Division of the Central Valley Project (CVP). The Bureau of Reclamation makes this water available by diverting the San Joaquin River at Friant Dam and delivers it through the Friant-Kern and Madera Canals. This provides critical supplies to more than 15,000 farms on about 1 million acres; six cities, including the fifth largest city in California, the city of Fresno; and countless rural communities. This surface water is vitally important to our people because the Friant Division is a conjunctive-use project, where both groundwater and surface water are used to provide needed supplies.

When the federal government stepped in to build the CVP in the 1930s, it made promises to the people in our area that if they paid for the project, it would deliver a permanent, reliable water supply. We upheld our end of that bargain and we developed a vibrant and highly productive agricultural economy. This year, for the first time ever, the government broke its promises to us. The CVP delivered no water to the Friant Division. The system was never designed for this much strain—the entire demand of the east side of the Valley—to be placed on our groundwater, and it has crumbled under the weight. Groundwater levels in our area are now perilously low.

Within the Porterville Irrigation District service area, staff is aware of 55 domestic wells that have already failed. In the surrounding community, there are over 300 documented cases of families losing their wells. Even by conservative estimates, Tulare County already has **over 1400 people without any access to water in their homes**, and we continue to hear of new cases every day. When these people turn the faucet on, no water comes out. They have no water to cook, no water to wash their dishes or clothes, no water to brush their teeth, no water to bathe or shower, no water to flush their toilets. This is an intolerable situation for them, and it is unacceptable.

Of course, the extent of this disaster reaches far beyond individual homes. Municipal wells are also starting to fail. For example, the city of Tulare has lost four of its municipal wells due to the drought, and their production has dropped from 3.9 million gallons per day to 3.3. We understand that in the northern part of the Friant service area, the city of Madera has lost seven of its municipal wells. This is simply not sustainable.

Rural schools that rely on wells are also losing service or are on the verge of having their wells fail. The Columbine Elementary School in Delano has not received any Friant water since the start of this season in March, so it is having to rely on its two wells to meet all its water needs. One of these wells failed during the summer session. It is vital for the school to maintain water service since it must provide meal programs for the roughly 55% of the student body that needs them. As a re-

sult, the school had to cut all outdoor water use. This has resulted in dry, dusty playgrounds. Columbine is not the only school that is suffering from a lack of water. We are personally aware of another school in Strathmore that is in the exact same situation, for the exact same reasons. In fact, according to the Tulare County Superintendent of Schools, dozens of rural schools throughout the County rely on wells and are facing similar impacts. Schools are also experiencing drops in attendance as the poor air quality triggers health concerns like asthma.

While our people are facing the grim reality of trying to figure out how they can live without water, we are hearing rumors that the Restoration Program may take several thousand acre-feet to “test” fish flows this fall. It is absolutely unacceptable to waste water on tests when right now, people in our area lack water to meet their most basic needs. This water cannot be wasted on tests to determine what some potential future fish might be able to tolerate; that water must be delivered to the Friant districts, now, so it can be used by the people who so desperately need it.

Our communities cannot survive another year like this. People in our area, like people everywhere, need water to survive. We urge you to take immediate action to ensure that the Valley has a safe, reliable water supply to serve its communities in 2015, and beyond.

Sincerely,

MIKE ENNIS,  
*Tulare County Supervisor, Fifth District.*

ERIC BORBA,  
*Director, Porterville Irrigation District.*

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[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE  
COMMITTEE’S OFFICIAL FILES]

## **Resolutions and News Articles Submitted for the Record by Rep. Costa**

### **Resolutions**

- RESOLUTION 14–80—a Resolution of the City of Clovis Requesting Action by Congress on Drought Legislation, dated August 25, 2014
- RESOLUTION 2014–40—a Resolution of the City Council of the City of Dinuba Requesting Action by Congress Concerning Drought Relief Legislation, dated August 26, 2014
- RESOLUTION 14–40—a Resolution of the City Council of the City of Firebaugh Requesting Action by Congress on Drought Legislation, dated August 18, 2014
- RESOLUTION 2309—a Resolution of the City Council of the City of Fowler Requesting Action by Congress on Drought Legislation, dated August 19, 2014
- RESOLUTION 2014–143—a Resolution of the Council of the City of Fresno, California to Request Action by Congress on Pending Water Legislation, dated August 28, 2014
- RESOLUTION 14–314—a Resolution of the Board of Supervisors of the County of Fresno, State of California in the Matter of Emergency Drought Relief and Water Delivery Legislation, dated August 26, 2014
- RESOLUTION 1852—a Resolution of the City of Huron Requesting Action by Congress on Drought Legislation, dated September 3, 2014

- RESOLUTION 14–51—a Resolution of the City Council of the City of Kerman Requesting Action by Congress on Drought Legislation, dated August 20, 2014
- RESOLUTION 14–045—a Resolution of the Board of Supervisors of the County of Kings, State of California in the Matter of Emergency Drought Relief and Water Delivery Legislation, dated August 19, 2014
- RESOLUTION 2014–32—a Resolution of the City Council of the City of Kingsburg, California Requesting Action by Congress on Drought Legislation, dated August 20, 2014
- RESOLUTION—a Resolution of the League of California Cities—Latino Caucus Requesting Action by Congress on Drought Legislation, dated July 10, 2014
- RESOLUTION 14–31—a Resolution of the City Council of the City of Mendota Requesting Action by Congress on Drought Legislation, dated July 10, 2014
- RESOLUTION 2014–42—a Resolution of the City of Orange Cove Requesting Action by Congress on Drought Legislation, dated August 18, 2014
- RESOLUTION 2014–50—a Resolution of the City Council of the City of Parlier Requesting Action by Congress on Drought Legislation, dated August 20, 2014
- RESOLUTION 7629—a Resolution of the City Council of the City of San Fernando Requesting Action by Congress on Drought Legislation that Corrects Delta Water Management Problems, dated August 18, 2014
- RESOLUTION 2014–34R—a Resolution of the City Council of the City of Selma Requesting Action by Congress on Drought Legislation, dated August 18, 2014

### News Articles

- Grossi, Mark. “House panel meeting in Fresno hears emotional impact of Calif. drought,” *The Fresno Bee*. March 19, 2014.
- Grossi, Mark. “Food lines have begun in Mendota,” *The Fresno Bee*. May 2, 2014.
- Rodriguez, Robert. “Drought drying up small Central Valley farmers’ future,” *The Fresno Bee*. July 19, 2014.
- Villa, Juan. “Zero water allocation protested at Tulare water rally,” *Visalia Times-Delta*. March 28, 2014.
- Villa, Juan. “Local farmers needed to keep blackbird off endangered list,” *Visalia Times-Delta*. April 9, 2014.
- Villa, Juan. “Drought relief food comes to Tulare County,” *Visalia Times-Delta*. April 22, 2014.
- Villa, Juan. “High temperatures add to drought woes for farmers,” *Visalia Times-Delta*. June 17, 2014.